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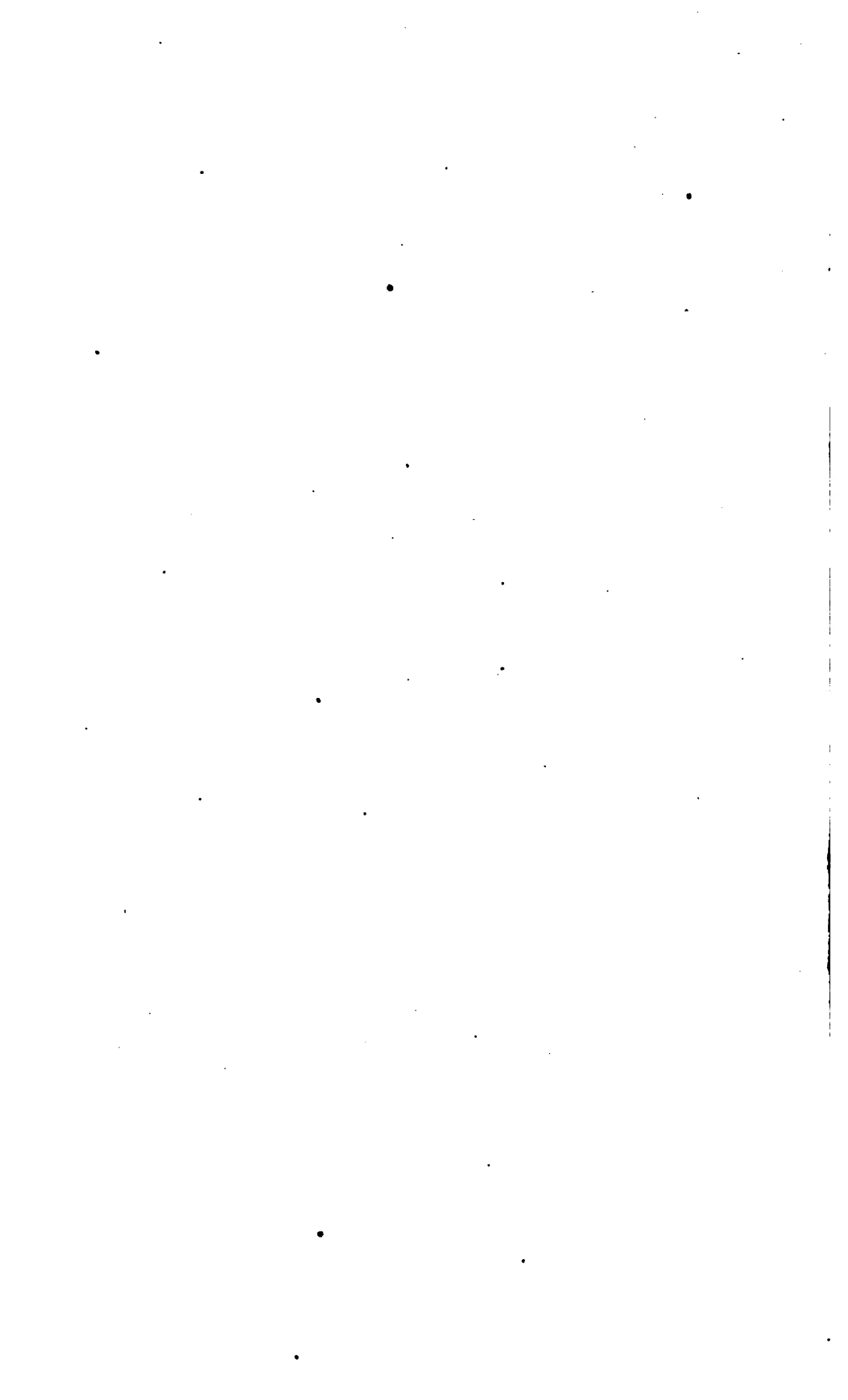


1. may 30 **VOL. 111—N. Y. COURT OF APPEALS.**

112 ¹	295	604
112 ³ 21	113 ³ 61	118 ¹ 548
112 ³ 74	181 ³ 183	183 ³ 641
128 ³ 520	119 ³ 550	638
134 ³ 165	121 ³ 692	130 ¹ 577
140 ³ 307	306	644
139 ⁴ 26	126 ¹ 52	129 ³ 536
135 ³ 408	310	118 ³ 618
116 ³ 182	119 ¹ 478	673
118 ³ 817	331	114 ¹ 605
129 ¹ 112	122 ³ 602	a 680
143 ³ 616	125 ³ 629	112 ³ 528
122 ¹⁰ 214	112 ³ 222	
66	115 ⁴ 85	
140 ³ 586	184 ⁴ 77	
117 ³ 563	141 ¹ 218	
132	118 ³ 652	
144 ¹ 407	339	
117 ² 11	141 ¹ 218	
117 ³ 20	135 ² 468	
117 ² 86	343	
117 ² 89	143 ¹ 330	
143	187 ³ 408	
123 ⁴ 432	131 ³ 280	
138 ³ 523	350	
170	114 ² 608	
121 ³ 505	115 ² 496	
178	117 ² 647	
140 ⁴ 104	137 ² 500	
136	362	
142 ¹ 34	115 ² 202	
123 ³ 644	131 ¹ 482	
125 ² 54	401	
121 ³ 212	119 ¹ 547	
126 ³ 110	135 ¹ 209	
119 ³ 125	441	
109	115 ¹ 508	
120 ¹ 294	122 ³ 388	
124 ¹ 426	446	
124 ¹ 659	139 ³ 313	
204	465	
146 ³ 143	125 ¹ 413	
136 ⁴ 423	473	
139 ⁴ 221	115 ¹ 611	
118 ¹ 150	485	
119 ² 220	112 ² 451	
132 ³ 376	120 ³ 177	
230	518	
118 ³ 86	119 ³ 24	
131 ³ 184	523	
238	d185 ² 416	
116 ² 242	141 ³ 171	
117 ² 433	126 ³ 428	
137 ² 515	531	
239	131 ³ 416	
113 ¹ 78	111 ³ 684	
d140 ² 285	550	
146 ¹ 187	114 ³ 584	
259	116 ³ 634	
119 ¹ 355	129 ³ 672	
135 ³ 384	131 ³ 585	
265	134 ³ 194	
141 ² 345	554	
270	113 ³ 324	
117 ³ 626	113 ³ 325	
284	144 ¹ 477	
d115 ² 455	581	
140 ¹ 265	133 ¹ 439	
	137 ¹ 97	

ABBREVIATIONS USED—c, criticised; d, distinguished; L, limited; o, overruled; s, same case; small figures indicate the section to which reference applies; * indicates reference is to a point not mentioned in syllabus; — indicates not enough of opinion is given to determine what point in syllabus is referred to.

X



Vol. 111. NEW YORK REPORTS.

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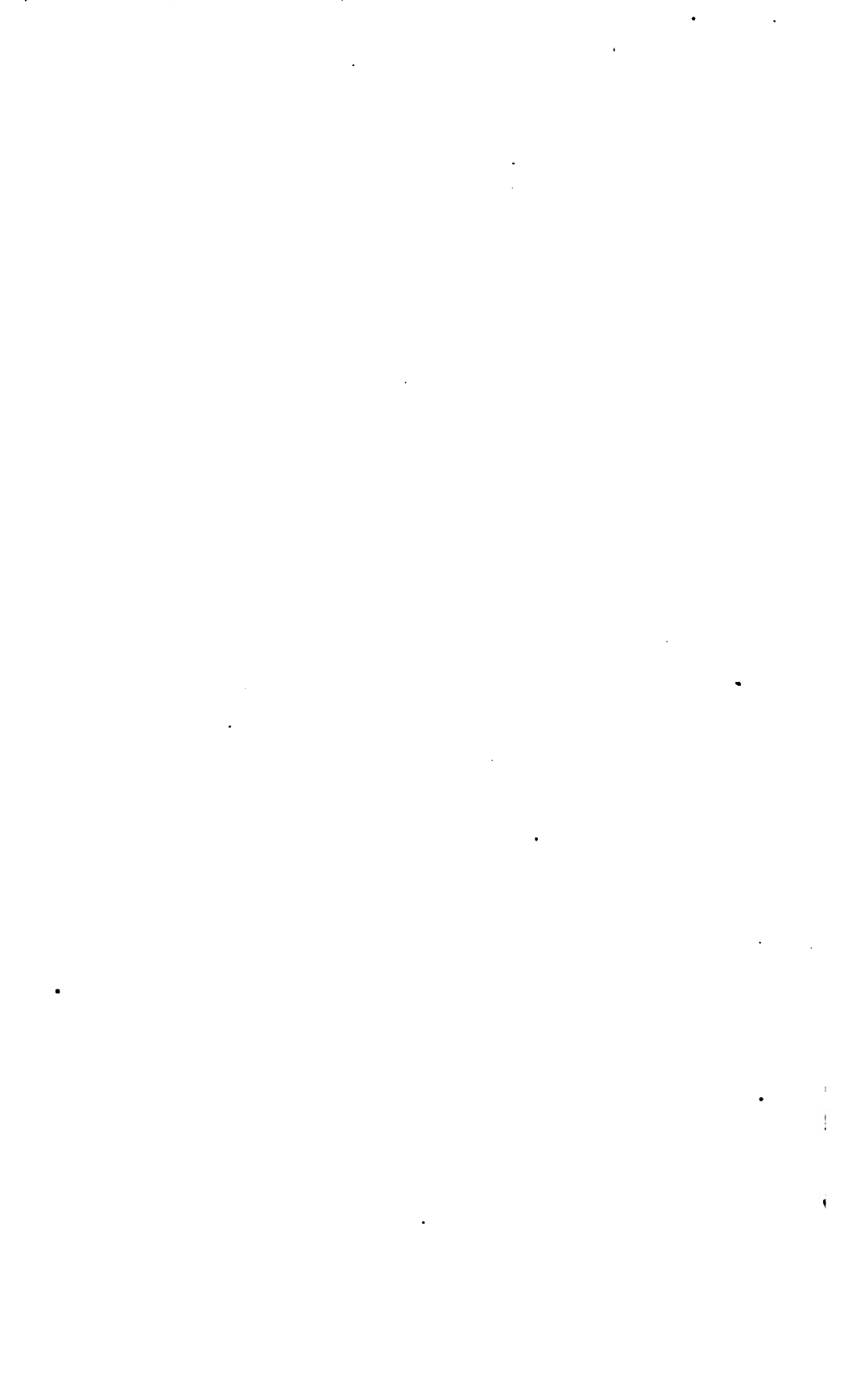
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1:148 US 410	66:136 US 178	188:44 Fed 944	318:72 Fed 742	488:168 Mas 455
37 LE ^d 503	34 LE ^d 434	150 Mas 136	6 LRA 242n	3 LRA 74n
56 Fed 833	4 LRA 706	3 LRA 500n	331:2 LRA 623	35 LRA 257
61 Fed 788	5 LRA 100n	4 LRA 764n	343:12 LRA 402n	38 LRA 423
64 Fed 634	10 LRA 560n	4 LRA 852n	14 LRA 839	505:16 LRA 421
64 Fed 650	21 LRA 793n	6 LRA 646n	350:46 Fed 279	19 LRA 81n
70 Fed 734	24 LRA 831	8 LRA 820n	27 LRA 102n	518:18 LRA 90
168 Mas 512	32 LRA 297n	32 LRA 438	37 LRA 141	21 LRA 48n
53 NJE 483	35 LRA 697	199:55 NJL 595	359:31 LRA 691	531:4 LRA 746n
3 LRA 652	37 LRA 824	16 LRA 236n	401:7 LRA 644n	6 LRA 573n
5 LRA 193n	38 LRA 346	22 LRA 461n	17 LRA 526	7 LRA 745n
5 LRA 350n	132:143 US 631	25 LRA 514	26 LRA 658	8 LRA 787n
5 LRA 371n	36 LE ^d 251	28 LRA 559	415:14 LRA 164	550:152 US 155
5 LRA 553	5 LRA 564	204:23 LRA 835	16 LRA 459	38 LE ^d 396
6 LRA 792n	19 LRA 571n	220:3 LRA 767	423:97 Fed 880	156 Mas 202
8 LRA 498n	31 LRA 831	38 LRA 127n	27 LRA 341n	168 Mas 411
9 LRA 196n	33 LRA 180n	39 LRA 306n	27 LRA 452n	590:6 LRA 642n
13 LRA 68n	143:160 Mas 516	39 LRA 718n	27 LRA 476n	604:13 LRA 390n
17 LRA 379	4 LRA 230n	223:36 LRA 794	28 LRA 164n	20 LRA 600n
17 LRA 679	6 LRA 364n	239:157 Mas 92	446:21 LRA 645	631:12 LRA 464n
20 LRA 129	10 LRA 67n	3 LRA 606	460:31 LRA 691	644:8 LRA 566n
26 LRA 277	11 LRA 757	17 LRA 188n	465:39 LRA 436	20 LRA 538n
26 LRA 673	13 LRA 420n	270:9 LRA 575n	473:13 LRA 354n	673:166 Mas 585
	20 LRA 440n	295:12 LRA 174n	28 LRA 707n	680:2 LRA 796
	23 LRA 676	306:159 Mas 579		682:19 LRA 700n
	270:7 LRA 578n	6 LRA 383n		
	21 LRA 47n	8 LRA 381n		
	178:9 LRA 216n	23 LRA 714		

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48

REPORTS OF CASES

DECIDED IN THE

Gaug 8

COURT OF APPEALS

OF THE

STATE OF NEW YORK,

FROM AND INCLUDING DECISIONS OF NOVEMBER 27, 1888, TO
AND INCLUDING DECISIONS OF JANUARY 15, 1889.

WITH

NOTES, REFERENCES AND INDEX.

BY H. E. SICKELS,
STATE REPORTER.

VOLUME CXI.

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GEORGE F. DANFORTH,

FRANCIS M. FINCH.

RUFUS W. PECKHAM,

JOHN C. GRAY,*

ASSOCIATE JUDGES.

* Elected November, 1888, *vice* Charles A. Rapallo, deceased.

TABLE OF CASES

REPORTED IN THIS VOLUME.

A.	PAGE.	C.	PAGE.
Abbott v. James.	673	Cager, In re Will of.	343
Appel, Adm'rx, etc., v. B. N. Y. & P. R. R. Co.	550	Cahen et al., Ex'rs, etc., Meyer, Ex'rx, etc., v.	270
Assessors of Brooklyn, Board of, et al., People ex rel. Mayor, etc., of N. Y. v.	505	Calder et al., Barry v.	684
		Campbell et al., Pfeiffer, Adm'rx, etc., v.	681
B.		Cary, Sherry v.	514
Ballou v. State of New York. . .	496	Cayuga Co. Surrogate's Appeal, In re Cager, Will of.	343
Barry v. Calder et al.	684	City of Binghamton, Fitzgerald, Adm'rx, etc., v.	686
Bellesheim et al., Fuechsel v. . .	682	Clark, People ex rel., v. Grant et al.	584
Biden et al. v. James, Impl'd, etc.	680	Clarke v. Mayor, etc., of N. Y.	621
Binghamton, City of, Fitzgerald, Adm'rx, etc., v.	686	Coleman, In re Will of.	220
Board Assessors Brooklyn et al., People ex rel. Mayor, etc., of N. Y. v.	505	Collins et al., Byam v.	143
B'd Street, Opening, In re, etc., of.	581	Commercial Advertiser Associa- tion, Henderson v.	685
Brooklyn Board Assessors et al., People ex rel. Mayor, etc., of N. Y. v.	505	Constant et al. v. University of Rochester.	604
Brown et al., Morris, Adm'rx, etc., v.	318	Cook, People ex rel. Schurz et al., v.	688
B. E. S. R. R. Co. v. B. S. R. R. Co.	132	Cornell, Ex'r, etc., Smith v. . .	554
B., N. Y. & P. R. R. Co., Appel, Adm'rx, etc., v.	550	Crawford et al., Mayor, etc., of N. Y. v.	638
B. S. R. R. Co., B. E. S. R. R. Co. v.	132	Cunard v. Francklyn.	511
Bull, In re Will of.	624		
Burger v. Burger, Ex'r, etc. . .	523	D.	
Bush et al., Adm'rs, etc. v. Roberts.	278	Davies v. Fish et al.	681
Butler et al. v. Johnson, Ex'rx, etc.	204	Dennerlein v. Dennerlein et al.	518
Byam v. Collins et al.	143	Deobold, Ex'r, etc., v. Oppen- mann et al.	531
		Deobold, Ex'r, etc., v. Oppermann et al.	684
		Diefenthaler v. Mayor, etc., of N. Y.	331
		D'Oench, People ex rel. Kemp v.	359

TABLE OF CASES REPORTED.

vii

	PAGE.		PAGE.
Matter of B'd St. Opening, etc., N. Y.	581	<i>Nat. Iron B'k v. Farrelly</i>	681
Matter of Bull, Will of.....	624	N. Y. C. & H. R. R. R. Co., Hoag, Adm'rx, etc., v.....	199
Matter of Cager, Will of.....	343	N. Y. L. Ins. Co., Harnickell v..	390
Matter of Coleman, Will of....	220	N. Y., Mayor, etc., Clarke v...	621
Matter of Fiske, Estate of.....	66	N. Y., Mayor, etc., Crawford et al. v.....	688
Matter of Gray, Estate of.....	404	N. Y., Mayor, etc., Diefenthaler v.	381
<i>Matter of Jones</i>	687	N. Y., Mayor, etc., Friend v....	381
Matter of McGraw, Estate of... 66		N. Y., Mayor, etc., Jex et al., Ex'rs, etc., v.....	389
Matter of Met. Tr. Co., N. Y....	588	N. Y., Mayor, etc., People ex rel. v. B'd Ass'rs, Brooklyn et al..	505
Matter of Paton, Acc'tg..	480	N. Y., Mayor, etc., Reilly v....	478
Matter of Piffard et al., Ex'rs, etc., Acc'tg.....	410	N. Y., Mayor, etc., v. Tenth Nat. Bank.....	446
Matter of Robert, Ex'r, etc., Acc'tg.....	372	N. Y., State of, Ballou v	496
Matter of Selleck, Ex'r, etc., Acc'tg.....	284		
<i>Matter of West</i>	687		
<i>Matter of Williams</i>	680		
Mayor, etc., of N. Y., Clarke v.	621	O.	
Mayor, etc., of N. Y. v. Craw- ford et al.	638	O'Brien et al., People v.....	1
Mayor, etc., of N. Y., Diefen- thaler v.....	381	Oppermann et al., Deobold, Ex'r, etc., v.	531
Mayor, etc., of N. Y., Friend v.	381	<i>Oppermann et al., Deobold, Ex'r,</i> <i>etc., v.....</i>	684
Mayor, etc., of N. Y., Jex et al., Ex'rs, etc., v.....	389		
Mayor, etc., of N. Y., People ex rel. v. B'd Ass'rs Br'klyn et al.	505	P.	
Mayor, etc., of N. Y., Reilly v.	478	Palmer v. Penn. Co.....	488
Mayor, etc., of N. Y. v. Tenth Nat. B'k.....	446	Park et al., Lyon v.....	350
Mead v. Parker.....	259	Parker, Mead v.....	259
Merry v. Hoopes et al., Ex'rs, etc.	415	Paton, In re Acc'tg.	480
Met. Tr. Co. of N. Y., In re....	588	Peck, Mangam et al., Ex'rs, etc., v.	401
Meyer, Ex'rx, etc., v. Cahen et al., Ex'rs, etc.	270	Penn. Co., Palmer v.....	488
Miller et al., Ex'rs, etc., v. Zeimer et al.....	441	People v. Jackson.....	362
Morris, Adm'rx, etc., v. Brown et al.....	318	People v. O'Brien et al.....	1
Munoz, Adm'rx, etc., v. Wilson,	295	People v. Weldon.....	569
Murray et al., Ex'rs, etc., Kern- ochan, Adm'rx, etc., v.....	306	People ex rel. Clark v. Grant et al.....	584
		People ex rel. Kemp v. D'Oench,	359
N.		<i>People ex rel. McClintock v. French</i> <i>et al</i>	684
Nash et al., People ex rel. Un. Ins. Co., Phila., et al., v.....	310	People ex rel. Mayor, etc., N. Y. v. B'd Ass'rs, Brooklyn.....	505
		<i>People ex rel. Schurzet al. v. Cook,</i> <i>People ex rel. Un. Ins. Co., Phila.,</i> <i>v. Nash et al.</i>	310
		Pfeiffer, Adm'rx, etc., v. Camp- bell et al.....	631
		<i>Phillips v. T. & B. R. R. Co...</i>	685

	PAGE.		PAGE.
Piffard et al., Ex'rs, etc., In re..	410	Stringham v. Hilton et al., Ex'rs,	
Prentice v. Weston et al.....	460	etc.....	188
R.		T.	
Reilly v. Mayor, etc., N. Y....	473	Tenth Nat. Bank, Mayor, etc.,	
Riley, Adm'rx, etc., Siedenbach v.	560	N. Y. v.....	446
Robert, Ex'r, etc., In re Acc'tg,	372	T. & B. R. R. Co., Phillips v..	685
Roberts, Bush et al., Adm'rs,			
etc., v.....	278	U.	
Rochester University of, Constant		Un. Ins. Co., Phila., People ex	
et al. v.....	604	rel. v. Nash et al.....	310
Rogers, Ex'rx, etc., v. Rogers,		University of Rochester, Con-	
Impl'd, etc.....	228	stant et al. v.....	604
Ross, Ex'r, etc., et al. v. Gleason		V.	
et al.....	683	Van Brunt v. Van Brunt.....	178
S.		W.	
Schurz et al., People ex rel., v.		Weldon, People v	589
Cook	688	West, In re.....	687
Seaman's B'k for Savings, N. Y.,		Weston et al., Prentice v.....	460
Glynn, Adm'r, etc., v.....	683	Whiton, Ex'r, etc., Masury v....	679
Selleck, Ex'r, etc., In re Acc'tg,	284	Whelpley et al., Loder v.....	239
Sherry v. Cary.....	514	Williams, In re.....	680
Siedenbach v. Riley, Adm'rx, etc.,	560	Wilson, Munoz, Adm'rx, etc., v.	295
Smith v. Cornell, Ex'r, etc.....	554	Y.	
Smith, Ex'r, etc., Kahnwieler v.	688	York et al., Gilbert et al. v.....	544
Spickerman v. McChesney, Ex'r,		Z.	
etc.	686	Zeimer et al., Miller et al., Ex'rs,	
State of N. Y., Ballou v.	496	etc., v.....	441
Stewart et al., Hollister v	644		

TABLE OF CASES

CITED IN THE OPINIONS REPORTED IN THIS VOLUME.

A.

	PAGE.
Ackert v. Lansing.....	59 N. Y. 646 327
Adams v. Way.....	32 Conn. 160, 172..... 264
Adcock v. Marsh.....	8 Ired. (Law), 361..... 165
Albany N. R. R. Co. v. Brownell...	24 N. Y. 345..... 45, 52
Alexander v. Tolleston Club of Chi..	110 Ill. 65..... 103
Allen v. Watson.....	16 J. R. 205..... 815
Angevine v. Jackson.....	103 N. Y. 470 530
Apgar v. Hayward.....	110 N. Y. 225 623
Armstrong v. Du Bois.....	90 N. Y. 97 525
Atlantic St. Bank v. Savery.....	82 N. Y. 291, 292 ... 106, 457, 611
Attorney-General v. Downing.	{ Ambler, 550, 571; 1 Dick. 414; 3 Ves. Jr. 71.; 5 id. 300; 8 id. 256 94
Atwill v. Mackintosh.....	120 Mass. 177 164

B.

Baine v. City of Rochester.....	85 N. Y. 523 530
Baird v. Bank of Washington.....	11 S. & R. 411..... 98
Baker v. Neff.....	73 Ind. 68..... 108
Baker v. N. W. Guar. Co.....	36 Minn. 185 103
Bank v. Widner ..	11 Paige, 529..... 315
Bank U. S. v. Davis.....	2 Hill, 451..... 457, 610
Barbier v. Connolly.....	113 U. S. 27 140
Barnard v. Onderdonk.....	98 N. Y. 158 176
Barnes v. Suddard.....	117 Ill. 237..... 103
Barrow v. Nashville, etc., Tel. Co....	9 Humph. 304..... 103
Barton v. City of Syracuse.....	36 N. Y. 54 502
Beck v. Carter.....	68 N. Y. 283..... 328, 329
Belknap v. Sealey.....	14 N. Y. 148..... 525
Belmont v. Coman.....	22 N. Y. 438 553
Bennet v. Smith.....	15 J. R. 354..... 444
Benton v. Martin.....	52 N. Y. 570 398
Benton v. Wickwire.	54 N. Y. 226, 229..... 60, 61
Bergen v. Urbahn.....	83 N. Y. 49..... 301
Bissell v. Mich. So. & N. I. R. R. Co.	22 N. Y. 259 105

TABLE OF CASES CITED.

		PAGE.
Bloodgood v. Bruen.....	8 N. Y. 362.....	212
Bogardus v. Trinity Church	4 Paige 178.....	101, 109
Bogardus v. Trinity Church	4 Sandf. Ch. 688, 758..	99, 100, 109
Boos v. Ins. Co	64 N. Y. 236.....	528
Borst v. Corey	15 N. Y. 505.....	217, 838
Boston Silk, etc., Mills v. Eull	1 Sweeney, 359.....	518
Brackett v. Griswold	108 N. Y. 428.....	355
Brady v. Durbrow	2 E. D. Smith, 78	518
Brehm v. Mayor, etc., New York....	104 N. Y. 186.....	343
Brewster v. City of Syracuse.....	19 N. Y. 116.....	459
Brooklyn C. R. R. Co. v. Brooklyn } City R. R. Co.	82 Barb. 864	42, 49
Brooks v. Avery	4 N. Y. 226.....	444
Brotherton v. Hatt	2 Vern. 574.....	618
Brown v. Mayor, etc	63 N. Y. 239.....	459
Bruecher v. Village Port Chester....	101 N. Y. 240.....	336
Bucklin v. Chapin	1 Lans. 443, 448..	212
Bullis v. Montgomery	50 N. Y. 352.....	567
Burke v. Witherbee	98 N. Y. 562..	195
Burnett v. Noble.....	5 Redf. 69	212
Butler v. Palmer	1 Hill, 335	48
Byrne v. N. Y. C. & H. R. R. R. Co..	104 N. Y. 362.....	827

C.

Cal. Tel. Co. v. Alta Tel. Co.....	22 Cal. 396	108
Camp v. Camp	2 Hill, 628	567
Canada So. R. Co. v. Gebhard	109 U. S. 527, 535, 541...	660, 663
Central City Savings Bk. v. Walker ..	66 N. Y. 428	57
Chamberlain v. Chamberlain	43 N. Y. 424, 439	86, 108
Chambers v. City of St. Louis.....	29 Mo. 576	103, 104
Champlin v. Laytin	6 Paige, 203.....	619
Chapman v. City of Brooklyn	40 N. Y. 372.....	624
Chester v. Dickerson	54 N. Y. 1	436
C. B. & Q. R. R. Co. v. Lewis.....	53 Iowa, 101	108
Children's Aid Society v. Loveridge..	70 N. Y. 387.....	245
Church v. Gilman	15 Wend. 656	303
City of Detroit v. D. & F. P. R. Co..	43 Mich. 140	52
Clapp v. Fullerton.....	84 N. Y. 190, 195... 227, 247,	527
Clark v. Hougham	2 B. & C. 149	538
Clarke v. Ford.....	3 Keyes, 370.....	217
Coats v. Mayor, etc.....	7 Cow. 585.....	140
Cobb, v. Knapp.....	71 N. Y. 348.....	309
Coit v. Campbell.	82 N. Y. 517.....	356, 357
Comm. v. Essex Company	13 Gray, 239.....	52
Continental Ins. Co. v. Rhodes.....	119 U. S. 237.....	548
Coulthart v. Clementson	L. R., 5 Q. B. 42.	309
Count Joannes v. Bennett.	5 Allen, 169.....	157

TABLE OF CASES CITED.

xi

	PAGE.
Cowell v. Springs Co.	100 U. S. 55. 108
Coxhead v. Richards	2 Mann., G. & S. 569, 602..... 151
Craft v. Boite	1 Saund. 248..... 163
Craigie v. Hadley.....	99 N. Y. 181..... 457, 610, 618
Craig v. Parkis	40 N. Y. 181..... 262
Crocker v. Whitney .:..	71 N. Y. 161..... 105
Cumings v. Arnold..	3 Metc. 486..... 264
Custer v. Tompkins Co. Bank	9 Penn. St. 28. . 457
Cuyler v. McCartney	40 N. Y. 221, 328..... 282

D.

Darlington v. Mayor, etc..	31 N. Y. 164..... 459, 511
Dash v. Van Kleeck.....	7 J. R. 477, 577..... 56, 58, 60
Davis v. Mayor, etc.....	14 N. Y. 506..... 38, 39, 43
Davis v. Old Colony R. R. Co.....	131 Mass. 258, 273..... 99, 102
Day v. Town of New Lots	107 N. Y. 157..... 299
De Camp v. Dobbins	29 N. J. Eq. 36..... 99, 101
De Camp v. Dobbins	31 N. J. Eq. 671, 690.... 102, 109
De Forest v. Jewett, Rec'r, etc.	88 N. Y. 264..... 554
Denike v. N. Y. & R. L. & C. Co....	90 N. Y. 599..... 64
Devin v. Patchen.....	26 N. Y. 441..... 527
Devoe v. Ithaca & O. R. R. Co.....	5 Paige, 521..... 62
Dickinson v. Mayor, etc	92 N. Y. 584..... 343
Doe v. Webber	1 Barn. & Ald. 713..... 486
Downing v. Marshall.....	23 N. Y. 366, 387..... 107
Dresser v. Norwood	17 Com. B. (N. S.) 466..... 609
Dunham v. C. P., etc., R. Co.....	1 Wall. 254..... 662, 663
Dwight v. Germania Ins. Co	84 N. Y. 493..... 513

E.

Earl of Tyrone v. Marquis of Waterford.....	1 De Gex, F. & J. 613..... 486
Eaton v. Del., L. & W. R. R. Co. ..	57 N. Y. 382..... 330
Eckhardt v. People	83 N. Y. 462..... 574
Edington v. Mut. L. Ins. Co.....	67 N. Y. 185..... 225
Ehrgott v. Mayor, etc.....	96 N. Y. 264..... 455
Elsev v. Metcalf	1 Den. 323 .. 303
Elwood v. W. U. Tel. Co.....	45 N. Y. 549 . 300
Embury v. Sheldon	68 N. Y. 234 .. 188
Equitable L. Ins. Co. v. Bostwick...	100 N. Y. 629 .. 558
Erie & N. E. R. R. Co. v. Casey	26 Penn. St. 287, 301..... 54
Evans v. Cleveland.....	72 N. Y. 486..... 357, 358
Exchange Bank v. Monteath.....	26 N. Y. 505 .. 540
Ex parte Bond	1 Atk. 98..... 410
Ex parte Honey.....	L. R., 7 Ch. App. 178..... 410
Ex parte Mills v. N. Y. Com. Pleas..	10 Wend. 557..... 518
Ex parte Rowlandson	3 P. Wms. 405 .. 410

F.

PAGE.

Fairchild v. Fairchild.....	64 N. Y. 471.....	485, 486, 487
Farmers and Citizens Bank v. Payne.	25 Conn. 444	457
Fellows v. Longyor	91 N. Y. 824	538
Ferguson v. Broome	1 Bradf. 10.....	212
Ferguson v. Crawford.....	70 N. Y. 256	63
Field v. Schieffelin.....	7 J. Ch. 150.....	538
Fisher v. Hall	41 N. Y. 421	304
Fisher v. Hersey.....	78 N. Y. 387	522
Fitzgerald v. Quann.....	109 N. Y. 441	404
Fleming v. Burnham.....	100 N. Y. 8	676
Fleming v. People	27 N. Y. 334	575
Fletcher v. Peck.	6 Cranch, 87, 135.....	48
Fortier v. New Orleans Nat. Bank...	112 U. S. 439	105
Fraser v. Ehrensperger.	L. R., 12 Q. B. D. 310.....	315
Froes v. Ford.....	6 N. Y. 176	545, 546, 548, 549
Frost v. Koon	80 N. Y. 428	117
Fudickar v. Guard. Mut. L. Ins. Co.	62 N. Y. 392.....	680
Fuller v. Conde.....	47 N. Y. 80.....	518

G.

Gaffney v. People	50 N. Y. 423.....	576
Gardiner v. Gardiner	34 N. Y. 164.....	247, 527
Gassett v. Gilbert.....	6 Gray, 94	162
Gates v. Preston.....	41 N. Y. 113.....	177
Gerould v. Wilson.....	81 N. Y. 583.	537
Getty v. Binsse.....	49 N. Y. 385.....	309
Gifford v. Corrigan.	105 N. Y. 223.....	303
Gildersleeve v. Landon.....	78 N. Y. 609.....	300
Gilliland v. Campbell.....	18 How. 177.....	518
Gillshannon v. R. R. Co	10 Cush. 228.....	330
Glackin v. Zeller.....	52 Barb. 147.....	518
Godson v. Home	1 B. & B. 7.....	152
Goodhue v. Berrien.....	2 Sandf. Ch. 630.	301, 302
Gottlieb v. N. Y., L. E. & W. R. R. Co.	100 N. Y. 462.....	196
Goundie v. Northampton Water Co..	7 Penn. St. 233.....	98
Grace v. Ins. Co	109 U. S. 283.....	548
Grattan v. Met. L. Ins. Co	80 N. Y. 296.....	225
Greenwood v. Freight Co.....	105 U. S. 13.....	53
Griffin v. L. I. R. R. Co	101 N. Y. 348.....	566
Griffith v. Griffith.....	9 Paige, 317.....	620
Grissler v. Powers.....	81 N. Y. 61.....	445
Griswold v. Griswold.....	4 Bradf. 216.....	557
Griswold v. Haven	25 N. Y. 595.....	540
Gue v. Tide Water C. Co.....	24 How. (U. S.) 257.....	47

TABLE OF CASES CITED.

xiii

H.

PAGE.

Haight v. Hayt.....	19 N. Y. 464.....	355
Hall v. Earnest.....	36 Barb. 585.....	444
Hamilton v. Eno.....	81 N. Y. 116, 117....	150, 162, 164
Hargreaves v. Rothwell.	1 Keen's Ch. 154.....	609
Harpending v. Dutch Church.....	16 Pet. 455....	101
Harrison v. Bush.....	5 El. & Black. (Q. B.) 344.	150
Harrison v. Bush.....	32 Eng. L. & Eq. 173.....	164
Harriss v. Fawcett.....	L. R., 15 Eq. Cas. 311.....	309
Hastings v. Lusk.....	22 Wend. 410, 414....	162, 164, 169
Hayward v. Davidson.....	41 Ind. 212.....	103
Hazard v. Caswell.....	98 N. Y. 259.....	423
Heath v. Barmore.....	50 N. Y. 305.....	56
Hedenberg v. Hedenberg.	46 Conn. 30.....	355
Heser v. Donson.....	Buller's Nisi Prius, 8.....	165
Hewlett v. Elmer.....	103 N. Y. 153, 161....	226, 629, 630
Hillyard v. Miller.....	10 Penn. 326.....	107
Hodges v. Middleton.....	2 Doug. 431.....	486
Hoffman v. Tredwell.	6 Paige, 308.....	356
Holcomb v. Holcomb.....	95 N. Y. 316....	227
Holden v. N. Y. and Erie Bank.....	72 N. Y. 286, 291.....	457, 610
Holmes v. Williams.....	10 Paige, 382.....	446
Honegger v. Wettstein.....	94 N. Y. 252.....	300
Hough v. Cook Co. Land Co..	78 Ill. 23.....	103
Hounsell v. Smyth.....	7 C. B. (N. S.) 731.....	329
Hovender v. Lord Annesley.....	2 Sch. & Lef. 607.....	214, 217
Howard v. Thompson.....	21 Wend. 324.....	169
Hudson v. Osborne.....	{ 18 W. R. Ch. Dig. 44, par. 15; 89 L. J. R. (N. S.) 79.	420
Humbert v. Trinity Church.....	24 Wend. 587, 604, 629.....	101
Hume v. Mayor, etc.....	74 N. Y. 268.....	528
Hutchins v. Hutchins.....	7 Hill, 104.....	542
Huwer v. Dannenhoffer.....	82 N. Y. 499.....	423

I.

In re Cable Co.....	109 N. Y. 32.....	80, 88
In re Cottrell.....	95 N. Y. 333.....	226
In re Page.....	107 N. Y. 266.....	690
In re Ross.....	87 N. Y. 514.....	226, 247
In re Smith.....	95 N. Y. 516.....	247, 250
In re Wilson.....	108 N. Y. 874.....	245

J.

Jackson v. Bodle.....	20 J. R. 187	305
Jackson v. Perkins.....	2 Wend. 317.....	308
Jex v. Mayor, etc.....	103 N. Y. 536..	336

		PAGE.
Jones v. Givin	Gilbert's Cas. 185.....	167
Jones v. Habersham	107 U. S. 174.....	99, 102
Jordan v. Poillon	77 N. Y. 518	676
Jordan v. Van Epps	85 N. Y. 427	176

K.

Kain v. Bloodgood	7 J. Ch. 90, 128	56, 215
Kavanagh v. Wilson	70 N. Y. 177	300
Kaveny v. City of Troy	108 N. Y. 572	494
Keene v. La Farge	1 Bosw. 671	357
Ketchum v. Duncan	96 U. S. 659	663
Kilbourn v. Thompson	103 U. S. 168	58
King v. Barnes	109 N. Y. 267	488
King v. D'Eon	1 W. Black. 510.....	367
King v. Inhabts. Liverpool	7 B. & C. 61	510
King v. N. Y. C. & H. R. R. Co	66 N. Y. 181 ; 72 id. 607	196
King v. Talbot	40 N. Y. 90	538
King v. Waring	5 Esp. N. P. 13	168
Kinney v. City of Troy	108 N. Y. 570.....	494
Klinck v. Colby	46 N. Y. 427	150, 162
Knickerbocker v. People	43 N. Y. 179	576
Knolls v. Barnhart	71 N. Y. 474	305
Krebs v. Oliver	12 Gray, 289	157
Kundolf v. Thalheimer	12 N. Y. 593	546

L.

Lablache v. Kirkpatrick	8 Civ. Pro. R. 256, 340.....	518
Lady Superior, etc., v. McNamara	3 Barb. Ch. 378	304
Land v. Coffman	50 Mo. 243.....	108
Langdon v. Buel	9 Wend. 80	301
Langdon v. Mayor, etc	98 N. Y. 129	48
Lawrence v. Farley	24 Hun, 293.....	304
Leazure v. Hillegas	7 S. & R. 313	97, 98, 102, 109
Leggett v. Dubois	2 Paige, 211	856
Le Neve v. Le Neve.....	1 Amb. R. 436	616
Lewis v. Chapman	16 N. Y. 369	166, 167
Lewis v. Few	5 J. R. 35.....	163
License Case	5 How. (U. S.) 583	141
Lloyd's v. Harper	L. R., 16 Ch. Div. 290.....	309
Loder v. Hatfield	71 N. Y. 92, 104	215
Low v. Harmony	72 N. Y. 408.....	486
Lund v. Tyngsborough	9 Cush. 36	293

M.

McCosker v. L. I. R. R. Co.	84 N. Y. 77	196
McDougall v. Claridge	1 Camp. 267	165

TABLE OF CASES CITED.

XV

	PAGE.
M'Kenzie v. M'Leod	10 Bing. 385. 328
McKinney v. Grand St. etc. R. R. Co.	104 N. Y. 352. 228
McLaren v. Pennington	1 Paige, 102. 56, 63
McNulty v. Solley	95 N. Y. 242. 316
Manice v. Manice.	48 N. Y. 374. 187
Marsh v. Bulteel.	5 B. & Ald. 508. 315
Marvin v. Marvin.	11 Abb. Pr. (N. S.) 97, 101. 290
Marvin v. Marvin.	58 N. Y. 607. 486
Mason's Exrs. v. Alston	5 Seld. 28. 292
Matter of Anderson	109 N. Y. 554. 477
Matter of Com'rs Central Park.	50 N. Y. 493. 583
Matter of Dept. Public Parks.	85 N. Y. 459. 583
Matter of Estate of Brown	98 N. Y. 295. 486
Matter of Mason.	98 N. Y. 527. 293
Matter of N. Y. El. R. R.	70 N. Y. 327, 339. 34, 106
Matthews v. Meyberg	68 N. Y. 656. 528
Mayor, etc. v. Furze	8 Hill, 612. 517
Mayor, etc. N. Y. v. Second Ave. } R. R. Co.	32 N. Y. 261, 272. 39, 42, 43, 140
Mayor, etc. of Troy v. T. & L. R. } R. Co.	49 N. Y. 657. 30
Meech v. Allen	17 N. Y. 300. 409
Memphis & L. R. R. R. Co. v. R. R. } Com'rs.	112 U. S. 609, 619. 44
Merritt v. Bartholick	36 N. Y. 44. 301
Michigan v. Phoenix Bank.	38 N. Y. 9. 542
Milhau v. Sharp	27 N. Y. 611. 38, 39, 43, 49
Milks v. Rich.	80 N. Y. 269. 262
Missouri, etc., Co. v. Buchwell.	2 Neb. 192. 103
Mitchell v. Crasweller.	13 C. B. 247. 328
Moore v. Brooklyn, etc. R. R. Co.	108 N. Y. 98, 104. 106
Moore v. Giles.	49 Conn. 570. 305
Moore v. Metropolitan Bank	55 N. Y. 41. 540
Morris v. Morris	4 Grat. 293. 410
Morris R. Coal Co. v. Salt Co.	58 N. Y. 667. 680
Mountford v. Scott.	1 Turn. & R. Ch. 274. 608
Mumma v. Potomac Co.	8 Pet. 281, 285. 48
Munn v. Illinois	94 U. S. 113, 123, 124. 48, 141
Murphy v. Briggs.	89 N. Y. 450, 452. 303, 305
Murray v. Coster	20 J. R. 575, 585. 215

N.

National Bank v. Whitney	108 U. S. 99. 105
Natoma Water Co. v. Clarkin.	14 Cal. 544. 103
N. O., S. F. & R. R. Co. v. Delamore.	114 U. S. 501. 48
Newton v. Hook	48 N. Y. 676. 177
N. Y. & O. M. R. R. Co. v. Van Horn.	57 N. Y. 473. 60

		PAGE.
Nicoll v. N. Y. & E. R. R. Co.....	12 N. Y. 121	38
Nims v. City of Troy	59 N. Y. 500	502
Nixon v. Hamilton.....	{ 2 Drury & Walsh's Irish Chan- cery, 364	609, 616, 618, 619
Norris v. Le Neve.....	3 Atk. 26, 35.....	618
Northern Ins. Co. of N. Y. v. Wright,	76 N. Y. 445	262, 263

O.

Old Colony Railroad Corporation v. } Evans	6 Gray, 25	102
Ormsby v. Douglass.....	37 N. Y. 477.....	164

P.

Paige v. Waring	76 N. Y. 463, 470	620
Parker v. Browning	8 Paige, 888.....	58, 62
Parker v. Conner	93 N. Y. 118.....	282
Parkman v. Bowdoin.....	1 Sumner, 368.....	485
Payne v. Burnham	62 N. Y. 69	445, 446
Peacock v. Bell	1 Saund. 73	548
People v. Albany & S. R. R. Co.....	57 N. Y. 161	34
People v. Albany & Vt. R. R. Co ...	24 N. Y. 261	603
People v. Booth.....	33 N. Y. 397.....	34
People v. Boston & A. R. R. Co.....	70 N. Y. 569, 570.....	58, 140
People v. Bradner.....	107 N. Y. 1	549
People v. B'klyn, F. & C. I. R. R. Co.	89 N. Y. 75, 84, 93. 34, 42, 43, 47.	63
People v. Globe Mut. Life Ins. Co...	91 N. Y. 174.....	54
People v. Ingersoll.....	58 N. Y. 13	34
People v. McCall.....	94 N. Y. Y. 587.....	60
People v. McCann	16 N. Y. 58.....	59
People v. Metz	50 N. Y. 61	47
People v. National Trust Co	82 N. Y. 287.....	51
People v. O'Brien	103 N. Y. 657.....	34
People v. Schuyler	106 N. Y. 318.....	225
People v. Stout	23 Barb. 349	455
People v. Sturtevant	9 N. Y. 263..... 38, 40, 43, 49	
People v. Walker	17 N. Y. 502.....	623
People v. West	106 N. Y. 293	574, 575
People v. Willett.....	102 N. Y. 251.....	575
People ex rel. Kimball v. B. & A. R. } R. Co	70 N. Y. 569.....	48
People ex rel. Peake v. Supervisors } Columbia County.....	48 N. Y. 130	60
People ex rel. Ryan v. Civil Service } Board	41 Hun, 287	455
Perkins v. Giles	50 N. Y. 228	675
Petersen v. Chemical Bank	32 N. Y. 21	359
Phelps v. People	72 N. Y. 349.....	574

TABLE OF CASES CITED.

xvii

	PAGE.
Philips v. Wickham	1 Paige, 590
Platz v. Cohoes.....	26 Hun, 391; 89 N. Y. 219 ...
Porter v. Parmly	53 N. Y. 185
Porter v. Smith.....	107 N. Y. 581.....
Potter v. Carpenter	71 N. Y. 74.....
Poultney v. Randall.....	9 Bosw. 236.....
Pres. Church v. City of N. Y.	5 Cow. 588.....
President, etc., v. Conner.....	87 N. Y. 320.....
President, etc., Wash. Bk. v. Lewis ..	22 Pick. 24
Probst v. Delamater	100 N. Y. 266.....
Prowitt v. Rodman	87 N. Y. 42.....

R.

Raht v. Averill.....	106 N. Y. 423.
R. R. Commission Case.	116 U. S. 307..
Randall v. Hazeltine.. ..	12 Allen, 412..
Randall v. Sackett.....	77 N. Y. 480.....
Rathbun v. Rathbun.....	6 Barb. 102
Raynor v. Gordon.	23 Hun, 264.....
Renihan v. Dennin	103 N. Y. 574..... 225, 226, 246
Re Rouse v. Meier.....	L. R., 6 C. B. 212.....
Rider L. R. Co. v. Roach	97 N. Y. 378.....
Robbins v. Robbins.	89 N. Y. 251.....
Robert v. Corning.....	89 N. Y. 225, 241. . . . 187, 379
Robertson v. Cease.	97 U. S. 646.....
Robinson v. N. Y. C. R. R. Co.....	66 N. Y. 11.....
Rochester v. Town of Rush	80 N. Y. 302.....
Rogers v. Squires.....	98 N. Y. 50.....
Root v. French.	13 Wend. 572
Rundle v. Allison.....	34 N. Y. 180.....
Runyan v. Coster.....	14 Pet. (U. S.) 122, 131.. 98, 99, 100

S.

Sage v. Sherman	2 N. Y. 417.....
Selisbury v. Morse.....	7 Lans. 359
Sandford v. Handy.....	23 Wend. 268.
Schenck v. Dart.....	22 N. Y. 420.....
Schettler v. Smith.. ..	41 N. Y. 328.....
Scofield v. Churchill.....	72 N. Y. 565.....
Scott v. Guernsey	48 N. Y. 106.....
Scribner v. Williams....	1 Paige, 550.....
Seabury v. Bowen.....	3 Bradf. 207.....
Seymour v. Fellows.. ..	77 N. Y. 178
Sheridan v. Mayor, etc.....	68 N. Y. 30.....
Sherwood v. Am. Bible Soc.....	4 Abb. Ct. App. Dec. 227, 231. 84
Shields v. Ohio.....	95 U. S. 319.....

	PAGE.
Shipwright v. Clements.....	19 W. R. 599..... 420
Sigler v. Van Riper.....	10 Wend. 419..... 269
Sinking Fund Cases.....	99 U. S. 700, 747, 748..... 49, 141
Sixth Ave. R. R. Co. v. Kerr.....	72 N. Y. 330..... 39, 40, 43
Sloan v. N. Y. C. R. R. Co.	45 N. Y. 125..... 576
Smith v. Shelley.....	12 Wall. 353, 361..... 99, 100
Smith v. Van Ostrand.....	64 N. Y. 278..... 349
Smith v. Zalinski.....	94 N. Y. 519..... 440
Snyder v. Sherman.....	88 N. Y. 656..... 247
Somerville v. Hawkins.....	10 C. B. 583..... 162
Souillard v. Dias.....	9 Paige, 393..... 357
Spence v. Chambers.....	39 Hun, 193..... 550
Sprights v. Hawley.....	39 N. Y. 441..... 540
Spring Val. S. & L. Co. v. Jackson..	2 Sandf. 622..... 517
Stace v. Griffith.....	2 P. C. L. R. 420..... 161
Stanley v. President, etc.....	4 Dallas, 8..... 548
Steele v. Benham.....	84 N. Y. 634..... 567
Stevens v. M. H. R. Co.....	L. R., 8 Ch. Ap. 1064..... 600
Stevenson v. Lesley.....	70 N. Y. 517..... 188
Stewart v. Morse.....	79 N. Y. 629..... 528
Stillwell v. Staples.....	3 Abb. 365..... 513
Stone v. Farmers' L. & T. Co.....	116 U. S. 307..... 140
Storey v. Challands.....	8 C. & P. 234..... 152
Story v. Conger.....	36 N. Y. 673..... 542
Stover v. People.....	56 N. Y. 316..... 576
Strusburgh v. Mayor, etc.....	87 N. Y. 452..... 300
Stuart v. Palmer.....	74 N. Y. 184..... 62
Sturgess v. Knapp.....	31 Vt. 1..... 671
Sullivan v. Bonesteel.....	79 N. Y. 631..... 440
Sunderlin v. Bradstreet.....	46 N. Y. 128..... 166, 167
Sutton v. N. Y. C. & H. R. R. Co.	66 N. Y. 243..... 329
Sutton v. Ray.....	72 N. Y. 432..... 530

T.

Taylor v. Porter.....	4 Hill, 147..... 58
Taylor v. Yonkers.....	105 N. Y. 202..... 494
Ten Eyck v. Elmendorf.....	1 Caines, 427..... 263
Terry v. Wiggins.....	47 N. Y. 512..... 349
The Distilled Spirits.....	11 Wall. 356..... 609
Thomas v. Woods.....	4 Cow. 173..... 263
Thompson v. Menck.....	2 Keyes, 83..... 542
Tobey v. County of Bristol.....	3 Story, 800..... 315
Todd v. Hawkins.....	8 Car. & P. 88..... 157, 165
Tomlinson v. Jessup.....	15 Wall. 454, 457..... 49
Tompkins v. Greene.....	21 Hun, 257; 82 N. Y. 619..... 518
Tompkins v. Wheeler.....	16 Pet. 118..... 304
Toogood v. Spyring.....	1 Cr. M. & R. (Ex.) 181 .. 150, 164

TABLE OF CASES CITED.

xix

	PAGE
Toulmin v. Steere.....	8 Merivale, 209..... 616, 619
Tousley v. Barry	16 N. Y. 500..... 283
Town of Guilford v. Supervisors, etc.	18 N. Y. 143..... 459
Town of Mentz v. Cook	108 N. Y. 504..... 659
Truax v. Slater.....	86 N. Y. 632..... 283, 284
Trustees Dartmouth College v. } Woodward.....	4 Wheat. 518..... 49, 57, 63

U.

Union Bank v. Mott.....	27 N. Y. 633..... 355
Union Trust Co. v. Monticello & Pt. } J. R. R.....	68 N. Y. 311..... 668

V.

Vanderbilt v. Adams	7 Cow. 349..... 140
Vanderbilt v. Schreyer.....	91 N. Y. 392..... 541
Van Horne v. Campbell.....	100 N. Y. 287..... 349
Verplanck v. M. Ins Co.....	2 Paige, 450..... 62
Verplanck v. Sterry	12 J. R. 536..... 303
Vidal v. Girard's Ex'rs.....	2 How. (U. S.) 127..... 104
Voorhis v. Olmstead.....	66 N. Y. 116..... 541
Vynior's Case.....	8 Coke, 81 b. (4 vol. Frazer's ed. 302)..... 315

W.

Walsh v. Mayor, etc., N. Y.....	107 N. Y. 220..... 455
Ward v. Ingraham	1 E D Smith, 538..... 518
Warrick v. Warrick.....	3 Atk. 291, 294..... 608
Washburn v. Cooke.....	3 Den. 110..... 164, 167
Weatherston v. Hawkins	1 T. R. 110..... 164, 168
Weeks v. Cornwell.....	104 N. Y. 325..... 277
Weinhold v. Acker.....	49 Supr. Ct. 182..... 327
Welsh v. German Am. Bk.....	73 N. Y. 434..... 611
Wendell v. Baxter	12 Gray, 494..... 327
Westervelt v. Gregg.....	12 N. Y. 202..... 58
Weston v. N. Y. El. R. R. Co	73 N. Y. 595..... 493
Westover v. Aetna Ins. Co.....	99 N. Y. 56..... 225, 226, 246
Wetmore v. Porter	92 N. Y. 76..... 538
White v. Buloid	2 Paige, 475..... 356
White v. Howard	46 N. Y. 144..... 108, 112
White v. Nicholls	3 How. (U. S.) 266, 291 .. 150, 165
Whiteley v. Adams	15 C. B. (N. S.) 392..... 151
Whitney Arms Co. v. Barlow	63 N. Y. 63, 63..... 106, 110
Whitney v. Martine	88 N. Y. 535..... 614
Wilder v. Butterfield	50 How. Pr. 385..... 540
Wilder v. Keeler.....	3 Paige, 167..... 410
Wilmerding v. McKesson.....	103 N. Y. 336..... 538

TABLE OF CASES CITED.

		PAGE.
Witkowski v. Paramore.....	93 N. Y. 467	513
Wood v. Mayor, etc.....	7 Hun, 164.....	455
Woodcock v. Oxford & Worcester } R. R. Co.....	21 L. & Eq. R. 285	264
Wright v. Saddler	20 N. Y. 820	96
Wright v. Storrs.....	6 Bosw. 600.....	264
Wynehamer v. People.....	18 N. Y. 484	58

Y.

Yates v. Van De Bogert	56 N. Y. 526	38
Yenni v. McNamee	45 N. Y. 614	567
York v. Johnson.....	116 Mass. 462	153, 155

CASES DECIDED

IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK,

Commencing November 27, 1888.

111	1
112	21
112	74
111	1
118	317
111	9
116	182
111	1
122	214
111	1
126	520
129	112
111	1
134	105
111	1
135	408
111	1
139	26
111	1
140	307
111	1
143	616
111	1
153	582
111	1
155	82
111	1
157	459
157	468
157	477
111	1
161	187
111	1
163	232
111	1
165	280

790 authorities cited in arguments of this case.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant
and Respondent, v. JOHN O'BRIEN, as Receiver, etc., et al.,
Appellants and Respondents.

It seems that, while, by the incorporation of a company under the act of 1884 (Chap. 252, Laws of 1884), providing for the organization of street railroad companies, it is endowed with capacity to acquire and hold such rights and property, real and personal, as are necessary to enable it to transact the business for which it was created, and is allowed to mortgage its franchise as security for loans made to it, it has no present right or authority to construct or operate a railroad upon the streets of any municipality.

This right it may acquire by purchase, but it can only be acquired from the city authorities, who can grant or refuse it at their pleasure, and may grant their consent upon such terms and conditions as they choose to impose. The B. S. R. Co., a corporation organized under said act, obtained, by resolution of the common council of the city of New York, authority to lay tracks and run cars over Broadway in said city, upon certain terms and conditions prescribed in the resolution, but with no limitation as to time, or power of revocation reserved. The company duly accepted the grant, and fully complied with and performed all of said terms and conditions. It mortgaged its property and franchises as security for contemplated loans, and authorized its bonds, secured by said mortgage, to be sold, and they were purchased by investors without notice of any defect in their origin or execution; it also made traffic contracts with other roads. Thereafter it was dissolved by statute (Chap. 268, Laws of 1886). *Held*, that while the annulling act was constitutional and valid, its effect was only to take the life of the corporation; that the corporation took, through its grant from the city, an indefeasible title in the land, necessary to enable it to construct and maintain a

Statement of case.

street railway in Broadway and to run cars thereon, which constituted property; that all its property, including street rights or franchises, also its mortgages and valid contracts, including the traffic contracts, survived its dissolution; that upon such dissolution its trustees, then in office, became vested with the title to its property under the provisions of the Revised Statutes (1 R. S. 601, §§ 9, 10), as trustees for its creditors and stockholders; that the acts of 1886 (Chap. 271, and chap. 310, Laws of 1896), providing, in case of such a dissolution, for the taking away from the company of its street franchises, and for the winding up of its affairs by suit brought by the attorney-general, and the appointment of a receiver therein, are unconstitutional and void.

Although such a corporation be created for a limited period, it may acquire title in fee to property necessary for its use; and where the grant to it of the franchise to construct and operate its road in a city street is not, by its terms, limited and revocable, the grant is in fee, vesting the grantees with an interest in the street in perpetuity to the extent necessary for a street railroad; the rights granted to be exercised by the corporation or whosoever may lawfully succeed to them.

The statutes and authorities showing that such franchises are invested with the character of property, and are transferable as such, independent of the life of the original corporation, collated.

The tracks of a railroad company and the franchise of maintaining and operating its road in a public street are inseparable.

Constitutional or statutory provisions for the repeal of statutes, providing for the creation of corporations, or the annulment of charters of corporations, do not confer power to take away or destroy property or annul contracts, and an express reservation in such a statute of power to take away or destroy property lawfully acquired, under authority conferred by a charter, and any legislation which authorizes such a result to be accomplished indirectly is unconstitutional and void.

The provision of the General Railroad Act (§ 48, chap. 140, Laws of 1850), providing that the legislature may annul or dissolve any corporation formed under the act, "but such dissolution shall not take away or impair any remedy given against any such corporation * * * for any liability which shall have been previously incurred," creates the contract between the state and the corporation, and regulates the rights of parties upon the exercise by the state of the power of repeal.

Greenwood v. Freight Co. (105 U. S. 13); *People v. Globe M. L. Ins. Co.* (91 N. Y. 174); *E. & N. E. R. R. Co. v. Casey* (26 Penn. St. 287, 301), distinguished.

The proviso in said act of 1884 (§ 15), declaring that the authorization therein contained to companies formed under it, to lease or transfer to other companies their rights to run upon any portion of their tracks, shall not be construed to authorize any company "to lease its rights or franchises" to any other company owning or operating a road parallel thereto, was intended to avoid the monopoly of parallel lines, and to pre-

Statement of case.

vent the acquisition by one company of the exclusive possession and control of such lines; it does not, where the lines of two companies are parallel for a portion of their routes, preclude such companies from making traffic contracts for the partial use of their respective routes beyond the line of parallelism.

The provision of the act of 1839 (Chap. 218, Laws of 1839), authorizing such contracts, is not repealed by said proviso in the act of 1884.

As to whether an action by the attorney-general in the name of the People of the state, for the purpose of determining the rights and liabilities of parties, as affected by the dissolution of a corporation, is maintainable, *quære*. *People v. O'Brien* (45 Hun, 519) reversed.

(Argued March 5, 1888; decided November 27, 1888.)

THESE are cross appeals from a judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made at the October Term, 1887, which affirmed a judgment entered upon a decision of the court on trial at General Term.

This action was brought by the attorney-general, in the name of the People, against John O'Brien, as Receiver of the Broadway Surface Railroad Company; the Mayor, etc., of the city of New York; the Broadway and Seventh Avenue Railroad Company; the Twenty-third Street Railway Company; William H. Hayes, Francis A. Palmer, as trustees under certain mortgages executed by said Broadway Surface Railroad Company, also the president and trustees of said company at the time of its dissolution, and various other persons.

The nature of the action and the material facts are stated in the opinion.

Charles F. Tabor, attorney-general, and *William A. Poste* for the People. The People have a right to maintain this action. (Laws of 1886, chap. 310.) In construing a remedial statute, which has for its end the promotion of important beneficial public objects, a liberal construction is to be given when it can be done without doing violence to its terms. (*Wolcott v. Pond*, 19 Conn. 597; *Potter's Dwarries*, 203, 204, 231, notes; *Weed v. Tucker*, 19 N. Y. 422.) This suit falls within the scope of the jurisdiction of equity, and the statute, both directly and by implication, indicates the procedure

Statement of case.

whereby the powers of equity may be invoked in regard to the affairs of the dissolved corporation. (*Curran v. Arkansas*, 15 How. 312; *Lathrop v. Stedman*, 42 Conn. 583, 599; *Parker v. Browning*, 8 Paige, 388, 390; 40 Hun, 34; *People v. O'Brien*, 103 N. Y. 657.) The statute annulling the charter of the Broadway Surface Railroad is constitutional and valid. (*People v. Lacombe*, 99 N. Y. 43; *People v. Flagg*, 46 id. 401; *People v. Comstock*, 78 id. 356; *Smith v. People*, 47 id. 330; *Miller v. State*, 15 Wall. 478; *People ex rel. Kimball v. B. & A. R. R. Co.*, 70 N. Y. 569; *Erie v. Casey*, 26 Penn. St. 301; *Penn. College Cases*, 13 Wall. 190; *McLaren v. Pennington*, 1 Paige, 101; *Miners' Bk. v. United States*, 1 Green [Iowa], 553; *Crease v. Babcock*, 23 Pick. 335; *Lathrop v. Stedman*, 13 Blatch. 134; *Greenwood v. Freight Co.*, 105 U. S. 17; *State v. Curran*, 12 Ark. 321; *Fletcher v. Peck*, 6 Cranch, 88; *De Camp v. Eveland*, 19 Barb. 81; *Rumsey v. People*, 19 N. Y. 41; *Railroad Co. v. Maine*, 96 U. S. 499; *Sinking Fund Cases*, 99 id. 700; *Railroad Co. v. Georgia*, 98 id. 359.) The appointment of the receiver was regularly made and is valid. (*Tomlinson v. Bullock*, 4 Law Rep. [Q. B. D.] 230; *Lapeyre v. United States*, 17 Wall. 191, 198; *Mallory v. Hiles*, 4 Metc. [Ky.] 53; *In re Wehnan*, 20 Vt. 654; *Krom v. Levy*, 60 N. Y. 126; *Marvin v. Marvin*, 75 id. 240; *Burgess v. Salmon*, 97 U. S. 381; *Arnold v. United States*, 9 Cranch, 104; *Richardson's Case*, 2 Story, 571; *United States v. Norton*, 97 U. S. 164; *People v. Clark*, 1 Cal. 406; *Kennedy v. Palmer*, 6 Gray, 316; *Blydenburg v. Cotheal*, 4 N. Y. 418; *Small v. McChesney*, 3 Cow. 19; *Clute v. Clute*, 3 Denio, 263; *Rogers v. Beach*, 18 Wend. 533; *Bellasis v. Hester*, 1 Ld. Ray. 281; *Field v. Jones*, 9 East, 154; note in 26 Amer. Dec. 234.) The tenure and duration of franchises granted by the state to a corporation is clearly for the period of its corporate existence and no longer, and they expire at the end of that period unless renewed. They cannot be extended for a longer period by a mortgage or lease to another person or corporation. They also expire whenever the legislature, before the termination of the twenty

Statement of case.

years, elects to exercise the reserved right of repeal. (Senate Documents, 1832, No. 8, Opinions of the Attorneys-General, p. 42; *In re Orville Lee's Bk.*, 21 N. Y. 9; *In re Reciprocity Bk.*, 22 id. 9; *Erie v. Casey*, 26 Penn. St. 287; *Tomlinson v. Jessup*, 15 Wall. 454; *Railroad Co. v. Maine*, 96 U. S. 63.) Where the legislature or the state terminates the existence of a corporation, its contracts cease. (*People v. Globe Ins. Co.*, 91 N. Y. 174, 179, 180; *People v. A. & V. R. R. Co.*, 77 id. 232; *Jones v. Judd*, 4 id. 411; *Heine v. Meyer*, 61 id. 171; *Brooklyn S. T. Co. v. City of Brooklyn*, 78 id. 524; *Railroad v. Georgia*, 98 U. S. 359; *Shields v. Ohio*, 95 id. 319; *Greenwood v. Freight Co.*, 105 id. 13; 1 Black. Com. 484.) The franchise is a privilege conferred by grant from the government or sovereign power and is vested in individuals or corporations. (3 Kent's Com. 458; 2 Bl. Com. 37; *Danville v. Comm.*, 73 Penn. St. 38; *In re Thirty-fourth St. R. R. Co.*, 102 N. Y. 343.) While the fee of the streets of the city of New York was in the city, such title was held only in trust for the benefit of the People, and the trust was subject to the unqualified control of the legislature. (*People v. Kerr*, 27 N. Y. 188.) Although the fee of the streets may be in the municipal corporation, the city has no power to make a grant in perpetuity for the use of those streets to any railroad corporation. (*People v. Sturtevant*, 9 N. Y. 263; *Davis v. Mayor, etc.*, 14 id. 506; *Milbau v. Sharp*, 27 id. 611; *Mayor, etc., v. Second Ave. R. R. Co.* 32 id. 261.) The franchise granted by the state to operate a railroad in Broadway, and which was to terminate upon the death of the company, can not be augmented or extended by the power to mortgage the same. (*B. S. T. Co. v. Brooklyn*, 78 N. Y. 524; 26 Penn. St. 301; *Mumma v. Potomac*, 8 Peters, 281; *Railroad v. Georgia*, 98 U. S. 359; *Worcester v. N. & W. R. R. Co.*, 109 Mass. 103; *N. Y. P. & O. R. R. Co., v. Parmalee*, 15 W'kly Law Bul. 239; *W. W. R. R. Co. v. Board*, 35 Wis. 271; affirmed, 93 U. S. 595; *Stillman v. F. O. & C. R. R. Co.*, 27 Gratt. 119.) The mortgages and leases were given subject to the law and the determinate character of the franchises. The

Statement of case.

liability to terminate them at the pleasure of the legislature was part of the contract. (*Mumma v. Potomac Co.*, 8 Peters, 286; *People v. Globe Ins. Co.*, 91 N. Y. 179; *N. R. R. Co. v. Miller*, 10 Barb. 282; *Read v. Frankfort Bk.*, 23 Me. 320; *C. B. & Q. R. R. Co. v. Iowa*, 94 U. S. 155; *Peik v. Chicago & N. W. R. Co.*, 94 id. 164; 6 Bis. 131; *People v. A. & Vt. R. R. Co.*, 77 N. Y. 232.) The grant of a perpetual and indefeasible franchise to make use for private profit of the public highways of the state being inconsistent with legislative control of the streets is legally impossible. The power of the state to control the streets is for the public benefit, and, therefore, inalienable. (*Smith v. City of Rochester*, 92 N. Y. 463, 484; *People ex rel. Bristol v. Supervisors*, 20 Mich. 95; *People v. Kerr*, 27 N. Y. 188; *Goszler v. Georgetown*, 6 Wheat. 593; *Town of East Hartford v. Hartford Bridge Co.*, 10 How. [U. S.] 511; *Clark v. Corporation of Washington*, 12 Wheat. 54.) Even if it were within the legislative power to create an indefeasible and perpetual street railway franchise in lower Broadway, it is not to be supposed, in the absence of such declaration, that such a franchise was intended. (*People v. Kerr*, 27 N. Y., 188) The reserved right to repeal corporate charters, construed with respect to street railroad corporations, includes the power to abrogate or withdraw a franchise held by such corporations to use the public streets for private gain. (*Dartmouth College v. Woodward*, 4 Wheat. 518, 644; *Tracy v. T. & B. R. R. Co.*, 38 N. Y. 433, 437; *Dwar. on Stat.*, 690; *Slaughter-house Cases*, 16 Wall. 36, 81; *Mumma v. Potomac Co.*, 8 Peters, 281; *Greenwood v. Freight Co.*, 105 U. S. 13; *Turnpike Co. v. Illinois*, 96 id. 63; *Chicago v. Iowa*, 94 id. 155; *Peik v. Chicago*, Id. 164; *Erie R. Co. v. Casey*, 26 Penn. St. 257; *Ruggles v. Illinois*, 108 U. S. 527; *Fanning v. Osborne*, 102 N. Y. 441.) When the state withdrew the franchise to operate a railroad in Broadway, and to charge fares to the public, from the mortgagor, it also, by the same act, withdrew them from the mortgagee. (*Savings Bk. Cases*, 84 N. Y. 403; *Cagwin v. Town of Hancock*, Id. 532; *Town of Lyons v. Chamberlain*,

Statement of case.

89 id. 578; *Chicago L. Ins. Co. v. Needles*, 113 U. S. 574; *Craig v. Town of Andres*, 93 N. Y. 405; *Thompson v. Town of Mamakating*, 37 Hun, 400; *Bk. of Chenango v. Brown*, 26 N. Y. 467; *Heckman v. Pinckney*, 81 id. 211; *People v. Gold and Stock Co.*, 98 id. 67; *Turnpike Co. v. Illinois*, 96 U. S. 63.) When the state withdrew the privilege of operating a railroad in Broadway, from the corporation on which it was conferred, by annulling its charter, the same act terminated the right of any other corporation to use or enjoy the franchise under lease or contract from the Broadway Company. (*Penn. R. R. Co. v. St. Louis R. R. Co.*, 118 U. S. 290; *Abbott v. Johnstown G. & K. Horse R. R. Co.*, 80 N. Y. 27; *Thomas v. R. R. Co.*, 101 U. S. 71; *Pierson v. McCurdy*, 33 Hun, 521, 522, 523; 100 N. Y. 608; *Peik v. Chicago*, 4 Otto, 164; *Chicago v. Iowa*, id. 155; *N. O. Co. v. Delamore*, 114 U. S. 501; *Fanning v. Osborne*, 102 N. Y. 441; *East Ala. Co. v. Doe ex dem. Visscher*, 114 U. S. 341.) The leases were void in their inception for want of power to make them, in the lessor or lessees. (*T. & B. Co. v. B. H. T. & W. Co.*, 86 N. Y. 107; *Abbott v. Johnstown, etc., R. R. Co.*, 80 id. 27; *People v. Albany & V R. R. Co.*, 77 id. 232; *Thomas v. R. R. Co.*, 101 U. S. 71; *Penn. Co. v. St. Louis Co.*, 118 id. 290; *Heckman v. Pickney*, 81 N. Y. 211; *People v. G. S. T. Co.*, 98 id. 67; *Fischer v. R. R. Co.*, 46 id. 644; *Central Co. v. Twenty-third St. R. R. Co.*, 54 How. Pr. 168; *Woodruff v. Erie Co.*, 93 N. Y. 609; *Excelsior Co. v. Lacey*, 63 id. 422.) No special law applicable to the Twenty-third Street Railroad Company confers a franchise upon it to operate a railroad in Broadway. (*People v. B. H. T. & W. R. Co.*, 12 Abb. N. C. 230.) No corporation can absolve itself of its public uses. Any act by which it undertakes to do so is unlawful, and a violation of its charter. (*Thomas v. R. R. Co.*, 101 U. S. 71, 78.) An agreement to practically surrender the uses of a corporation to another is an attempt at unlawful consolidation. (*Pierson v. McCurdy*, 33 Hun, 521, 523; affirmed, 100 N. Y. 608.) Both the people and the receiver have a right in this action to raise the ques-

Statement of case.

tion as to the validity of the leases or traffic contracts. (*Gillett v. Moody*, 3 Coms. 479; *Talmadge v. Pell*, 3 Seld. 328; *Atty-Gen. v. Mut. L. Ins. Co.*, 77 N. Y. 272, 275; *Leavitt v. Palmer*, 3 Coms. 19; *Curtis v. Leavitt*, 15 N. Y. 43, 44, 45; Laws of 1858, chap. 314.) Chapter 310 of the Laws of 1886, providing a method of procedure for winding up the affairs of the Broadway Surface Railroad Company, which was dissolved by chapter 268 of the Laws of the same year, is a constitutional statute in all its parts. Notwithstanding the fact that it became a law some days after the company was dissolved, it was intended to apply, and does apply, to the winding up of the affairs of the Broadway Surface Company. (*People ex rel. F. Ins. Co. v. Davenport*, 91 N. Y. 574; *Ayers v. Lawrence*, 59 id. 192-196; *People ex rel. Cook v. Wood*, 71 id. 371-374; 1 Bl. Com., 86 Esp. Pen. Act 1; 1 Kent's Com. 455; *People ex rel. Collins v. Spicer*, 99 N. Y. 225-233; *People v. Supervisors*, 43 id. 130, 132; *Donaldson v. Wood*, 22 Wend. 395; 1 Bacon's Ab. Stat. 5; *Smith v. People*, 47 N. Y. 330; *U. S. v. Freeman*, 3 How. [U. S.] 556; *People ex rel. v. Supervisors*, 70 N. Y. 228-236; *Brower v. Brower*, 1 Abb. Ct. App. Dec. 214; Potter's Dwaris [Postnote Case], 237; *Campbell v. Evans*, 45 N. Y. 356; *Sands v. Kimbark*, 27 id. 147; 3 R. S. [Banks' 7th ed.] 470, § 73; Id. 2400, § 73; *Scott v. Williams*, 23 How. Pr. 393; *In re Crook*, 23 Hun, 696; *Wynehamer v. People*, 13 N. Y. 378-442; *Commonwealth v. Ketchings*, 5 Gray, 486.) The receiver and not the directors of the dissolved corporation is entitled to wind up the affairs of such corporation. (*Lathrop v. Stedman*, 13 Blatch. 134-150.)

Denis O'Brien for the receiver. The People have a right to maintain this action. (Laws of 1886, chap. 310.) In construing a remedial statute, which has for its end the promotion of important beneficial public objects, a liberal construction is to be given when it can be done without doing violence to its terms. (*Wolcott v. Pond*, 19 Conn. 597; Potter's Dwaris, 203, 204, 231, notes; *Weed v. Tucker*, 19 N. Y. 422.) The suit falls within the scope of the jurisdiction of equity, and

Statement of case.

the statute, both directly and by implication, indicates the procedure whereby the powers of equity may be invoked in regard to the affairs of the dissolved corporation. (*Curran v. Arkansas*, 15 How. 312; *Lathrop v. Stedman*, 42 Conn. 583, 599; *Parker v. Browning*, 8 Paige, 388, 390; 40 Hun, 34; *People v. O'Brien*, 103 N. Y. 657.) The statute annulling the charter of the Broadway Surface Railroad is constitutional and valid. The legislature is the sole judge of the propriety of such repeal, and its discretion therein may not be reviewed. (1 R. S., tit. 3, chap. 18, § 8; *People v. Lacombe*, 99 N. Y. 43; *People v. Flagg*, 46 id. 401; *People v. Comstock*, 78 id. 356; *Smith v. People*, 47 id. 330; *Erie v. Casey*, 26 Penn. St. 301; *Penn. College Cases*, 13 Wall. 190; *McLaren v. Pennington*, 1 Paige, 101; *Miners' Bank v. United States*, 1 Greene [Iowa], 553; *Crease v. Babcock*, 23 Pick. 335; *Lathrop v. Stedman*, 13 Blatchf. 134; *Greenwood v. Freight Co.*, 105 U. S. 17; *State v. Curran*, 12 Ark. 321; *Fletcher v. Peck*, 6 Cranch, 88; *De Camp v. Eveland*, 19 Barb. 81; *Rumsey v. People*, 19 N. Y. 41; *R. R. Co. v. Maine*, 96 U. S. 499; *Sinking Fund Cases*, 99 id. 700; *R. R. Co. v. Georgia*, 98 id. 359.) With regard to the time at which a statute takes effect, no divisions of a day are allowable; a statute goes into effect from the first moment of the day on which it receives the executive sanction, unless some other day is specified therein or by general statute for its taking effect. (*Tomlinson v. Bullock*, 4 Law Rep. [Q. B. D.] 230; *Lapeyre v. United States*, 17 Wall. 191, 198; *Mallory v. Heles*, 4 Metc. [Ky.] 53; *In re Welman*, 20 Vt. 654; *Krone v. Levy*, 60 N. Y. 126; *Marvin v. Marvin*, 75 id. 240; *Burgess v. Salmon*, 97 U. S. 381; *Arnold v. United States*, 9 Cranch, 104; *Richardson's Case*, 2 Story, 571; *United States v. Norton*, 97 U. S. 164; *People v. Clark*, 1 Cal. 406; *Kennedy v. Palmer*, 6 Gray, 316; *Blydenburg v. Cotheal*, 4 N. Y. 418; *Small v. McChesney*, 3 Cow. 19; *Clute v. Clute*, 3 Denio, 263; *Rogers v. Beach*, 18 Wend. 533; *Bellasis v. Hester*, 1 Ld. Ray. 281; *Field v. Jones*, 9 East, 154; Note in 26 Am. Dec. 234.) The

Statement of case.

repeal or alteration of an act creating a corporation does not, in any proper sense of the term, interfere with vested rights or impair the obligations of the contract between the state and the persons on whom the franchise was conferred. (Sen. Doc., 1882, No. 8, Opins. of the Atty's-Gen. 42; *In re Orville Lee's Bank*, 21 N. Y. 9; *In re Reciprocity Bank*, 22 id. 9; *Erie v. Casey*, 26 Penn. St. 287; *Tomlinson v. Jessup*, 15 Wall. 454; *Turnpike Co. v. Illinois*, 96 id. 63.) Where the legislature or the state terminates the existence of a corporation, its contracts cease. (*People v. Globe Ins. Co.*, 91 N. Y. 174, 179, 180; *People v. A. & V. R. R. Co.*, 77 id. 232; *Jones v. Judd*, 4 id. 411; *Heine v. Meyer*, 61 id. 171; *B. S. T. Co. v. City of Brooklyn*, 78 id. 524; *R. R. Co. v. Georgia*, 98 U. S. 359; *Shields v. Ohio*, 95 id. 319; *Greenwood v. Freight Co.*, 105 id. 13; 1 Bl. Com. 484.) The franchise to construct and operate a railroad in Broadway, and to take tolls from the public, was the gift of the state, and not the result of any contract with the city or the property owners. (3 Kent's Com. 458; 2 Bl. Com. 37; *Danville v. Comm.*, 73 Penn. St. 38; *In re Thirty-fourth St. R. R. Co.*, 102 N. Y. 343; *People v. Kerr*, 27 id. 188; *People v. Sturtevant*, 9 id. 263; *Davis v. Mayor, etc.*, 14 id. 506; *Milhan v. Sharp*, 27 id. 611; *Mayor, etc., v. Second Ave. R. R. Co.*, 32 id. 261.) The franchise granted by the state to operate a railroad in Broadway, and which was to terminate upon the death of the company, cannot be augmented or extended by the power to mortgage the same. (*B. S. T. Co. v. Brooklyn*, 78 N. Y. 524; 26 Penn. St. 301; *R. R. Co. v. Georgia*, 98 U. S. 359; *Worcester v. N. & W. R. R. Co.*, 109 Mass. 103; *N. Y., P. & O. R. R. Co. v. Parmelee*, 15 Week. Law Bul. 239; *W. W. R. R. Co. v. Board*, 35 Wis. 271; affirmed, 93 U. S. 595; *Silliman v. F. O. & C. R. R. Co.*, 27 Gratt. 119.) The mortgages and leases were given subject to the law and the determinate character of the franchises. The liability to terminate them at the pleasure of the legislature was part of the contract. (*Mumma v. Potomac Co.*, 8 Pet. 286; *People v. Globe Ins. Co.*, 91 N. Y. 179; *N. R. R. Co. v. Miller*, 10 Barb. 282; *Read v. Frankfort Bank*, 23 Me.

Statement of case.

320; *C., B. & Q. R. R. Co. v. Iowa*, 94 U. S. 155; *Peik v. C. & N. W. R. Co.*, 94 id. 164; *People v. A. & V. R. R. Co.*, 77 N. Y. 232.) The grant of a perpetual and indefeasible franchise to make use for private profit of the public highways of the state is inconsistent with legislative control of the streets, and, therefore, legally impossible. The power of the state to control the streets is for the public benefit, and is, therefore, inalienable. (*Smith v. City of Rochester*, 92 N. Y. 463, 484; *People ex rel. Bristol v. Supervisors*, 20 Mich. 95; *People v. Kerr*, 27 N. Y. 188; *Goszler v. Georgetown*, 6 Wheat. 593; *Town of East Hartford v. Hartford Bridge Co.*, 10 How. [U. S.] 511; *Clark v. Corp. of Washington*, 12 Wheat. 54.) Even if it were within the legislative power to create an indefeasible and perpetual street railway franchise in lower Broadway, it is not to be supposed, in the absence of such declaration, that such a franchise was intended. (*People v. Kerr*, 27 N. Y. 188.) The reserved right to repeal corporate charters, construed with respect to street railroad corporations, includes the power to abrogate or withdraw a franchise held by such corporations to use the public streets for private gain. (*Dartmouth College v. Woodward*, 4 Wheat. 518, 644; *Tracy v. T. & B. R. R. Co.*, 38 N. Y. 433, 437; *Dwarris on St.* 690; *Santa Clara Case*, 118 U. S. 394; *Greenwood v. Freight Co.*, 105 id. 13; *Turnpike Co. v. Illinois*, 96 U. S. 63; *Chicago v. Iowa*, 94 id. 155; *Peik v. Chicago*, Id. 164; *Ruggles v. Illinois*, 108 id. 527; *Fanning v. Osborne*, 102 N. Y. 441.) Persons dealing with corporations, or purchasing their bonds in the markets, must take notice of the limitations upon their powers to issue the bonds, and are deemed to contract with reference to those limitations. (*Savings Bank Cases*, 84 N. Y. 403; *Cagwin v. Town of Hancock*, Id. 532; *Town of Lyons v. Chamberlain*, 89 id. 578; *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574; *Craig v. Town of Andres*, 93 N. Y. 405; *Thompson v. Town of Mamakating*, 37 Hun, 400.) The power to mortgage, and through a mortgage to transfer a franchise, not being one inherently necessary to a corporation for the purpose of enabling it to carry out the

Statement of case.

objects of its incorporation, the bare permission of the statute of 1850 to mortgage franchises (if, indeed such permission were ever available to a street railroad company) should not be amplified by construction, but should be strictly construed. (*Turnpike Co. v. Illinois*, 96 U. S. 63; *Heckman v. Pinckney*, 81 N. Y. 211; *People v. Gold & Stock Co.*, 98 id. 67.) When the state withdrew the privilege of operating a railroad in Broadway from the corporation on which it was conferred, by annulling its charter, the same act terminated the right of any other corporation to use or enjoy the franchise under lease or contract from the Broadway company. (*People v. B. H. T. & W. R. R. Co.*, 12 Abb. N. C. 230; *Penn. R. R. Co. v. St. Louis R. R. Co.*, 118 U. S. 290; *Thomas v. R. R. Co.*, 101 id. 71; *Abbott v. J. G. & K. H. R. R. Co.*, 80 N. Y. 27; *Pierson v. McCurdy*, 33 Hun, 521, 522, 523; 100 N. Y. 608.) In no case could the city waive the objection that the contracts were illegal, nor lengthen the term of a franchise, the duration of which depended upon the legislative will. (*Peik v. Chicago*, 4 Otto, 164; *Chicago v. Iowa*, Id. 155; *N. O. Co. v. Delamore*, 114 U. S. 501; *Fanning v. Osborne*, 102 N. Y. 441; *East Ala. Co. v. Doe ex dem. Visscher*, 114 U. S. 341.) The leases were void in their inception for want of power to make them, in the lessor or lessees. (*T. & B. Co. v. B., H. T. & W. R. R. Co.*, 86 N. Y. 107; *Abbott v. Johnstown, etc., R. R. Co.*, 80 id. 27; *People v. A. & V. R. R. Co.*, 77 id. 232; *Thomas v. R. R. Co.*, 101 U. S. 71; *Penn. Co. v. St. Louis Co.*, 118 id. 290; *Heckman v. Pinckney*, 81 N. Y. 211; *People v. G. S. T. Co.*, 98 id. 67; *Fisher v. R. R. Co.*, 46 id. 644; *Central Co. v. Twenty-third St. Co.*, 54 How. Pr. 168; *Woodruff v. Erie Co.*, 93 N. Y. 609; *Excelsior Co. v. Lacey*, 63 id. 422.) No corporation can absolve itself of its public uses; any act by which it undertakes to do so is unlawful and a violation of its charter. (*Thomas v. R. R. Co.*, 101 U. S. 71, 78.) An agreement to practically surrender the uses of a corporation to another is an attempt at unlawful consolidation. (*Pierson v. McCurdy*, 33 Hun, 521, 523; affirmed, 100 N. Y. 608.) Both

Statement of case.

the People and the receiver have a right in this action to raise the question as to the validity of the leases or traffic contracts. (*Gillett v. Moody*, 3 Coms. 479; *Talmadge v. Pell*, 3 Seld. 328; *Att'y-Gen'l v. Mutual L. Ins. Co.*, 77 N. Y. 272, 275; *Leavitt v. Palmer*, 3 Coms. 19; *Curtis v. Leavitt*, 15 N. Y. 43, 44, 45; Laws of 1858, chap. 314.) In construing a statute its title is a legitimate subject of consideration in determining the legislative intent. (*People ex rel. Fire Ins. Co. v. Davenport*, 91 N. Y. 574; *Ayers v. Lawrence*, 59 id. 192-196; *People ex rel. Cook v. Wood*, 71 id. 371, 374.) Chapter 310 of the Laws of 1886 is a remedial statute; that is to say, one which affords a remedy; it provides for a new case. (1 Bl. Com., 86 Esp. Pen. Act 1.) Being a remedial statute, it is not subject to the general rule that statutes are to be construed as prospective in the absence of words expressly applying them to past cases. (*People ex rel. Collins v. Spicer*, 99 N. Y. 225-233; *People v. Supervisors*, 43 id. 130, 132; *Donaldson v. Wood*, 22 Wend. 395; 1 Bacon's Ab. Statutes, 5; *Smith v. People*, 47 N. Y. 330; *U. S. v. Freeman*, 3 How. 556; *People ex rel. v. Supervisors*, 70 N. Y. 228-236; *Brower v. Brower*, 1 Abb. Ct. App. Dec. 214; Potter's Dwaris [Post-note Case], 237.) The receiver and not the directors of the dissolved corporation is entitled to wind up the affairs of such corporation. (*Lathrop v. Stedman*, 13 Blatch. 134-150.)

James C. Carter and *Elihu Root* for the Broadway and Seventh Avenue Railroad Company, defendant. All the powers which corporations possess are substantial powers to take some part in the actual affairs of men, and are in the nature of grants to a pre-existing person created and defined by the powers first mentioned, and fitted to receive such grants. (*Dartmouth College v. Woodward*, 4 Wheat. 519, 680, 691.) The act creating the corporation, so far as it creates the abstract person, is a mere law and, so far as it bestows the substantial rights, is a grant. (*State v. Hayward*, 3 Rich. [S. C.] 389, 411.) The substantial rights of a corporate body being the subjects of grant to it, and being things which might be granted to

Statement of case.

any natural person, are, in their nature, as capable of transmission by assignment as they were of original grant. (*Hall v. Sullivan Ry. Co.*, 21 Law Rep. 138.) If the right is assignable, the legal title to it passes, upon the death or bankruptcy of the corporation, like all its other property, to such officers as the state may appoint to receive it; but the equitable and beneficial interest becomes vested (in the case of a stock corporation) in its creditors and stockholders. (*New Orleans R. R. Co. v. Delamore*, 114 U. S. 501.) The substantial franchise bestowed was not a grant to the company personally alone, but was expressly made assignable. (Laws of 1850, chap. 40; Laws of 1854, chap. 282; Laws of 1873, chaps. 469, 710; Laws of 1874, chap. 430; Laws of 1876, chap. 446; Laws of 1880, chap. 113.) An inseparable union of the franchise with the real estate and fixtures requisite for its enforcement stands at common law without the aid of any statute. (*Gue v. Tide Water Canal Co.*, 24 How. 257; *People v. Brooklyn, F. & C. I. R. R. Co.*, 89 N. Y. 75.) The act of 1886 (Chap. 168), which assumes to annul and dissolve the Broadway Surface Company, had no other effect upon the franchise to construct and operate a railroad than to devolve it upon the representatives of that body for the benefit of its creditors and stockholders. (*Fletcher v. Peck*, 6 Cranch, 47, 135; *Morawetz on Corp.* §§ 660, 666; *Angell & Ames on Corp.* § 767; *People v. Oakland Co. Bk.*, 1 Doug. [Mich.] 286-288.) Since the Revised Statutes, words of inheritance are not necessary to create an estate in perpetuity. (2 R. S., chap. 1, tit. 5, § 1.) Even the ordinary presumption against the grantee in public grants is displayed in cases where, as here, the grant is for a valuable consideration. (*Langdon v. Mayor, etc.*, 93 N. Y. 129.) The franchise still exists as property, and as the property of those beneficially interested in the corporation, and is applicable in the first instance to the discharge of liens upon it, next to the payment of general creditors, and the residue is distributable among stockholders. (General Railroad Act, Laws of 1850, chap. 140, §§ 28, 225; Laws of 1884, chap. 252, § 1; *Hall v. Sullivan R. R. Co.*, 21 Law Rep. 138; *Morgan v. Louisiana*, 93 U. S. 217, 223;

Statement of case.

New Orleans, etc., R. R. Co. v. Delamare, 114 U. S. 501; *Metz v. Railway Co.*, 58 N. Y. 61; *Adams v. B. H. & E. R. R. Co.*, 4 Bank. R. 99; *E. B. F. R. R. Co. v. Hubbard*, 10 Allen, 459, note; *Sweat v. B. H. & E. R. R. Co.*, 5 Bank. R. 243; *R. R. Co. v. James*, 6 Wall. 740; *W. R. Bridge Co. v. Shepherd*, 21 How. 112; *Memphis, etc., R. R. Co. v. Comm.*, 112 U. S. 629; *Greenwood v. Freight Co.*, 105 id. 13.) The substantial franchise of the Broadway Surface Company was gained after it became a corporation, and became vested in it by a legitimate exercise of its previously acquired powers. It was, consequently, property beyond the reach of any exercise by the legislature of its reserved power. (*Comm. v. Essex Co.*, 13 Gray, 237-253; *Sinking Fund Cases*, 99 U. S. 700-720.) This franchise having been acquired by contract cannot be taken away or destroyed without impairing the obligation of the contract. (U. S. Con., art. 1, § 10; *Fletcher v. Peck*, 6 Cranch, 47; *People v. Sturtevant*, 9 N. Y. 273; *Milbau v. Sharp*, 27 id. 607; *City of Brooklyn v. B. C. R. R. Co.*, 47 id. 475.) All the obligations of the Broadway Surface Railroad Company survive in the same manner precisely as its rights survive, and its property and property rights survive in the same condition in which they were at the time the act of dissolution was passed, subject to the contracts or other transactions theretofore had in respect thereto by the Broadway Surface Company. (*Mumma v. Potomac Co.*, 8 Peters, 281; *R. W. & O. R. R. Co. v. O. S. R. R. Co.*, 16 Hun, 445.) The traffic contracts were authorized by the act of 1839, which was in full operation. (*People v. B. R. R. Co.*, 89 N. Y. 75, 86; *Woodruff v. Erie R. Co.*, 93 id. 616.) The act of 1839 did not authorize any railroad lease. (*Abbot v Johnson*, 80 N. Y. 27.)

Albert Stickney and Nelson S. Spencer for the Twenty-third Street Railway Company and Jacob Sharp, defendants. In passing on the validity of the repealing act, the court will consider its purpose and its necessary effect. (*People ex rel. Collins v. Spicer*, 99 N. Y. 225, 233; *Hudson Iron Co. v.*

Statement of case.

Alger, 54 id. 173, 175; *Platt v. Union Pacific R. R. Co.*, 99 U. S. 48, 59; *In re Jacobs*, 98 N. Y. 98, 110, 111; *People v. Supervisors of Columbia Co.*, 43 id. 130, 132.) Such an act for such a purpose is virtually a bill of pains and penalties, and as such is within the prohibition of the Constitution of the United States. (4 Bl. Com. 259; Cons. of U. S. art. 1, § 10; *Cummings v. State of Missouri*, 4 Wall. 237; *Ex parte Garland*, Id. 333; *Fletcher v. Peck*, 6 Cranch, 137.) Such an act is not an exercise of legislative power. (4 Bl. Com. 259; 1 Stephen's *Hist. of Crim. Law. of Eng.* 145 *et seq.*; 4 Stephen's *Com.* 298, 299.) Such an act is an attempt to deprive citizens of property "without due process of law." (*Taylor v. Porter*, 4 Hill, 140; *Powers v. Bergen*, 6 N. Y. 358; *Burch v. Newbury*, 10 id. 374; *Wynehamer v. People*, 13 id. 378; *Brevoort v. Grace*, 53 id. 245; *In re Jacobs*, 98 id. 98; *People v. Marx*, 99 id. 377.) As to this property of this corporation, and these corporators, it is, at least, matter of grave doubt whether the so-called right to "repeal" is any longer left in the legislature. (*In re Oliver Lee's Bk.* 21 N. Y. 9; *Miller v. N. Y. & E. R. R. Co.*, 21 Barb. 513; *Albany N. R. Co. v. Brownell*, 24 N. Y. 345; *Miller v. State*, 15 Wall. 478; *Holyoke Co. v. Lyman*, 15 id. 500, 519; *Sinking Fund Cases*, 99 U. S. 700, 718, 720, 739, 741-744, 747, 748, 757; *Hyatt v. McMahon*, 25 Barb. 457, 468; *Detroit v. Detroit & Howell Plankroad Co.*, 43 Mich. 140.) The winding-up act has no retrospective effect. (*Goillotel v. Mayor*, 87 N. Y. 441; *N. Y. & O. M. R. R. Co. v. Van Horn*, 57 id. 473, 477; *Hamilton v. Knick. L. Ins. Co.*, N. Y. D'y Reg. Dec. 15, 1882; *Trist v. Cabenas*, 18 Abb. Pr. 143.) A court of equity has no inherent power of any kind over corporations, and especially has it no power to appoint a receiver of one of them. Such power as it possesses it derives in every instance from statute. (High on Receivers [2d ed.] §§ 288, 289; *Att'y-Gen. v. Utica Ins. Co.*, 2 Johns. Ch. 371; *Bangs v. McIntosh*, 23 Barb. 504.) The winding-up act cannot divest the title of the directors of the dissolved corporation as trustees. (*Luhrs v. Eimer*, 80 N. Y. 171, 180; *De Voe v. I. & O. R. R. Co.*,

Statement of case.

5 Paige, 521; High on Receivers, § 112; *Baker v. Admr. of Backus*, 32 Ill. 79; *Gravestien's Appeal*, 49 Penn. St. 310; *Young v. Rollins*, 85 N. C. 485; *Stuart v. Palmer*, 74 N. Y. 183.) The operating contract made with the Twenty-third Street Railway Company is a valid and continuing claim. (*Whitney Arms Co. v. Barlow*, 63 N. Y. 62; *Rider Raft Co. v. Roach*, 97 id. 378; *Kent v. Quicksilver Mining Co.*, 78 id. 159; *People ex rel. Twenty-third Street Co. v. Squire*, 53 N. Y. Supr. Ct. 536.) The act of 1839 has never been repealed, and has been held to confer the most extensive power upon railroad corporations in the use of their respective roads. (*Woodruff v. Erie R. Co.*, 93 N. Y. 609.) Repeals by implication are not favored. (*Hankins v. Mayor, etc.*, 64 N. Y. 18, 21; *People ex rel. Woods v. Crissey*, 91 id. 616, 629; *In re Curser*, 89 id. 401; *Mark v. State*, 97 id. 572, 578; *Mongeon v. People*, 55 id. 616; *People ex rel. Kingsland v. Palmer*, 52 id. 83, 88; *In re D. & H. C. Co.*, 69 id. 209; *People ex rel. Stiner v. Morrison*, 78 id. 84; *People v. Brooklyn F. & C. I. R. Co.*, 89 id. 75; *In re Gilbert Elevated Road*, 70 id. 361, 372.) Should the act of 1839, for any reason, be deemed not to confer the authority to make the contract in question, special authority is found for it in the act of 1873. (*H. B. & M. F. R. R. Co. v. Southern Boulevard Co.*, 41 Hun, 553; *McKenna v. Edmonstone*, 91 N. Y. 234; *People v. Quigg*, 59 id. 33, 88; *Van Denburgh v. Village of Greenbush*, 66 id. 71; *Whipple v. Christian*, 80 id. 523.) A contract of this character always survives the death of the corporation. It is only personal contracts which are terminated by death, whether of individuals or corporations. All others are open and subsisting contracts. (*People v. Nat. Trust Co.*, 82 N. Y. 283; *T. & B. R. R. Co. v. B. H. T. & W. R. R. Co.*, 86 id. 107; *Great Northern Railway Co. v. Manchester, etc., R. Co.*, 10 Eng. L. & Eq. 11; 2 Redf. on Rys. 372; *Columbus, P. & I. R. R. Co. v. I. & B. R. R. Co.*, 5 McLean, 450; *Wilson v. Furness R. Co.*, L. R., 9 Eq. 28; *Stover v. Gt. W. R. Co.*, 2 Y. & C. Ch. 48.)

Statement of case.

S. P. Nash for bondholders, respondents, and *Lyman Rhoades* for mortgagee in trust respondent. The act "to annul and dissolve the Broadway Surface Railroad Company" is unconstitutional and void. (*Sinking Fund Cases*, 99 U. S. 700, 720, 721; 2 Kent's Com. 206, 207; Constitution of 1846, art. 8, § 1; *People v. Albertson*, 55 N. Y. 50.) The winding-up act (Laws of 1886, chap. 310) is void on several grounds: (1.) It makes the receiver a judicial officer to take all the evidence upon which the court is to allow or reject claims. (2.) It imposes on the court the duty of rejecting claims which might be open to contest. (3.) It requires bondholders, whose bonds may be deemed valid, to take a present payment in discharge of a long bond. (*Empire City Bank*, 18 N. Y. 199; *Fisk v. Jeff. Police Jury*, 116 U. S. 131.) The rights, privileges and consents dealt with by the "Consent" act were rights of property growing out of grants and contracts, and so protected by the Constitution. (*Nicoll v. N. Y. & E. R. R. Co.*, 12 N. Y. 121; 2 Kent, 307, note *a*; Ang. & Ames on Corp. § 307; *Curran v. State of Arkansas*, 15 How. 304.) The alleged irregularities in the organization of the Broadway Surface Railroad Company have no relevancy to the questions now presented to the court, and furnished no ground for annulling its corporate existence by legislative act. (*Kent v. Quicksilver Co.*, 78 N. Y. 159; *Davidson v. Westch. Gaslight Co.*, 99 id. 558.) This case is governed by the doctrine, that where the corporate act is in its external aspect within the general powers of the company, and is only unauthorized because it is done with a secret unauthorized intent, this wrongful intent is no defense against a stranger who dealt with the company without notice of such intent. (*Ellsworth v. St. L., Alt. & T. H. R. R. Co.*, 98 N. Y. 553; *New Providence v. Halsey*, 117 U. S. 336.)

Edward Winslow Paige for Mr. Palmer, trustee, etc., respondent. By the contract made by the resolution of the common council of the 5th of December, 1884, and the various instruments of acceptance by the Broadway Surface Railroad

Statement of case.

Company, a right for valuable consideration was granted to run passenger railroad cars perpetually upon Broadway. That right was a hereditament which is real estate and, of course, property. (*Mayor, etc v. Second Ave. R. R. Co.*, 32 N. Y. 261, 271, 273; *Brooklyn Cent. R. R. Co. v. Brooklyn City R. R. Co.*, 32 Barb. 358, 364; *State v. Mayor, etc.*, 3 Duer, 119, 130-132, 145-151; *Davis v. Mayor, etc.*, 4 Kern. 506, 532; *People Sturtevant*, 5 Seld. 263, 273; *Milhau v. Sharp*, 27 N. Y. 611, 620-622; *Howlet v. Belden*, Gen'l Term, 4th Dept.; *Sixth Ave. R. R. Co. v. Kerr*, 72 N. Y. 330, 332; *New Orleans, etc., R. R. Co. v. Delamore*, 114 U. S. 501.) The instrument in question in this case is a grant of a right of way for a railroad, an incorporeal hereditament, *i. e.*, property. (*People v. Sturtevant*, 5 Seld. 263, 273; *Sixth Ave. R. R. Co. v. Kerr*, 72 N. Y. 330, 332; *New Orleans, etc., R. R. v. Delamore*, 114 U. S. 501.) It could not be revoked nor in any way changed by the grantor, *i. e.*, the city. (*Mayor, etc. v. Second Ave. R. R. Co.*, 32 N. Y. 261, 271, 273; *Brooklyn Cent. R. R. Co. v. Brooklyn City R. R. Co.*, 32 Barb. 358, 364; *Milhau v. Sharp*, 27 N. Y. 611, 622; *State v. Mayor, etc.*, 3 Duer, 119, 145, 151; *New Orleans, etc., R. R. Co. v. Delamore*, 114 U. S. 501.) Nor by the state, so far as the state was interested in the real estate granted. (*Beekman v. S. & S. R. R. Co.*, 3 Paige, 45, 72; *Danolds v. State*, 89 N. Y. 36; *Fletcher v. Peck*, 6 Cranch, 87, 136-139.) The thing granted was not an interest personal merely to the Broadway Surface Railroad Company, but it was and is an interest assignable, like any other interest in real estate. *People v. Brooklyn, F. & C. I. R. Co.*, 89 N. Y. 75, 83, 84, 85, 90, 91; *Metz v. Buffalo, C. & P. R. R. Co.*, 58 id. 61; *New Orleans, etc., R. R. Co. v. Delamore*, 114 U. S. 501.) The grant being irrevocable by the grantor — not personal to the Broadway Surface Company — assignable, and containing no words of limitation, is perpetual. (*State v. Mayor, etc.*, 3 Duer, 119, 130, 131, 145-150; *Davis v. Mayor, etc.*, 14 N. Y. 506, 532; *People v. Sturtevant*, 9 id. 263, 273; *Milhau v. Sharp*, 27 id. 611, 620-622; *Brooklyn Cent. Co.*

Statement of case.

v. *Brooklyn City Co.*, 32 Barb. 358, 364.) By the provision of the general street act (Chap. 252, Laws of 1884), put into effect by the resolution of the common council of the 5th of December, 1884, the various instruments of acceptance and the order of the General Term, there was granted, for a valuable consideration, the franchise to perpetually use the right of way upon the street Broadway for the operation of a railroad. That franchise is property. (*Mayor, etc. v. Second Ave. R. R. Co.*, 32 N. Y. 261, 271, 273; *Brooklyn Cent. R. R. Co. v. Brooklyn City R. R. Co.*, 32 Barb. 358, 363; *Davis v. Mayor, etc.*, 4 Kern, 506, 523, 524; *Milbau v. Sharp*, 27 N. Y. 611, 618, 620.) The mortgages executed by the Broadway Surface Company were valid and effectual to bind all the property of that company, including the right of way and the franchise over the street Broadway. (*Van Cott v. Van Brunt*, 82 N. Y. 535, 539-541.) Sections 2 and 3 of chapter 271, Laws of 1886, which provide for the resale of the right of way and the franchise, for the benefit of the city of New York; and the provision in section 5 of chapter 310, Laws of 1886, to the effect that no claim or demand "shall be allowed for any greater amount than the money value of the consideration therefor," are unconstitutional and void. (*Sinking Fund Cases*, 99 U. S. 700; *Comm. v. Essex Co.*, 13 Gray, 239, 253; *Albany Northern Co. v. Brownell*, 24 N. Y. 345, 350-353; Chap. 140, Laws of 1850, § 28, sub. 10, as amended by chap. 133, Laws of 1880; Chap. 444, Laws of 1857, § 1; *New Orleans, etc., R. R. Co. v. Delamore*, 114 U. S. 501, 510.) The contracts made with the Broadway and Seventh Avenue Company and the Twenty-third Street Company are valid and still subsisting. (*People v. B. F. & R. R. Co.*, 89 N. Y. 75, 91; *Woodruff v. Erie R. Co.*, 93 id. 609; *Day v. Ogdensburg & L. C. R. R. Co.*, 13 N. E. Rep. 765; *Fisher v. N. Y. C. & H. R. R. Co.*, 46 N. Y. 664.) The act of 1884 deals with "leases" and "transfers" only. At the time of its passage there was no law in New York authorizing the lease of a railroad, and there is none now but this. (*T. & R. R. Co. v. B., H. T. & W. R. Co.*, 86 N. Y. 107; *Chicago*

Statement of case.

R. R. Co. v. Iowa, 4 Otto, 155, 162; *Day v. Town of New Lots*, 13 N. E. Rep. 915, 918; *Wright v. Delafield*, 25 N. Y. 266; *Neudecker v. Kohlberg*, 81 id. 296, 301; *Edmonstone v. McLoud*, 16 id. 543.) There is no one here who is in a position to raise the question as to the validity of the contract. (*Att'y-Gen. v. Reynolds*, 1 Eq. Cas. Ab. 131; *Att'y-Gen. v. Utica Ins. Co.*, 2 J. C. R. 370; *Att'y-Gen'l v. Bank of Niagara*, Hopk. 354; *U. S. Trust Co. v. N. Y., W. S. & B. R. Co.*, 101 N. Y. 478, 483; *Att'y-Gen. v. Tudor Ice Co.*, 104 Mass. 239; *Bissell v. M. S. & N. I. R. R. Co.*, 22 N. Y. 258, 281; *Whitney Arms Co. v. Barlow*, 63 id. 62, 68-70; *At. State Bk. v. Savery*, 82 id. 291, 307; *Woodruff v. Erie R. Co.*, 93 id. 609, 618, 619; *Rider Life Raft Co. v. Roach*, 97 id. 378, 381.) The tacit approval of the stockholders is equivalent to the vote and the filing of the certificate. (*Kent v. Quicksilver Mining Co.*, 78 N. Y. 159; *Zabriskie v. Cleveland, C. & C. R. R. Co.*, 23 How. 381, 396, 398; *G. W. R. Co. v. Oxford, W. & W. R. Co.*, 3 De G., M. & G. 341; *Greenpoint Sugar Co. v. Whiton*, 69 N. Y. 328, 333; *Rochester Savings Bk. v. Averell*, 96 id. 467, 473, 475, 476; *Veeder v. Mudgett*, 95 id. 295, 310.) The agreements to pay the bonds are valid. (*Curtis v. Leavitt*, 15 N. Y. 9.) The death of the Broadway Surface Company has no effect upon the contracts. An artificial being can make a contract affecting its property, outlasting in time its own life, just as a human being can. (*Nicoll v. N. Y. & E. R. R. Co.*, 12 N. Y. 121, 128.)

Thomas Allison for the Mayor, etc., respondent. The right to operate a railroad in any public street is a franchise which can be conferred only by the legislature. (*Davis v. Mayor, etc.*, 14 N. Y. 506; *People v. Kerr*, 27 id. 188; *Milhau v. Sharp*, Id. 611, 619.) The agreements were leases within the meaning of section 15 of the act of 1884. (*Langdon v. Mayor, etc.*, 93 N. Y. 129; *Mayor, etc. v. Broadway and Seventh Ave. R. R. Co.*, 97 id. 275; *Burchfield v. Northern Cent R. R. Co.*, 57 Barb. 582; *Hunt v. Comstock*, 15 Wend.

Statement of case.

665; *Thomas v. R. R. Co.*, 101 U. S. 71; *R. R. Co. v. R. R. Co.*, 81½ Penn. 104; *S. Car. R. R. Co. v. W. C. & A. R. R. Co.*, 7 S. C. 410; *Hall v. Brown*, 34 N. H. 495; *Com. Pilots v. Clark*, 33 N. Y. 251.) As to the case at bar the act of 1839 (Chap. 218), is repealed by the act of 1884. (*Heckman v. Pinckney*, 81 N. Y. 211.) The People of the state of New York have the right to raise the question whether or not a corporation is exercising a franchise without authority or in violation of law. (*People v. N. Y. & H. R. R. Co.*, 45 Barb. 73; *People v. Kerr*, 27 N. Y. 188; *Milhan v. Sharp*, Id. 611, 619; *Davis v. Mayor, etc.*, 14 id. 506.) The franchise to construct, maintain and operate a railroad on the route of this company was a charter right; the existence of a charter, of a grant from the legislature of this right or franchise was essential to its existence. (*Davis v. Mayor, etc.*, 14 N. Y. 506, 523; *Milhan v. Sharp*, 17 id. 611, 619; *In re Thirty-fourth St. R. R. Co.*, 102 id. 343, 351.) No statute can override the constitutional prohibition against the grant of an irrepealable and indestructible charter. (*N. Y. Cable R. R. Co. v. Chambers St. R. R. Co.*, 40 Hun, 29.) The right to exercise the power to absolutely annul the franchise held by the Broadway Surface Company to construct, maintain and operate a railroad on its route is not in any way impaired by the existence of contracts made by that company. Nor is the existence of that power made doubtful or impaired by calling these franchises or rights property or contracts. (*Chicago v. Iowa*, 4 Otto, 155; *Peik v. Chicago*, 4 id. 164; 6 Bissell, 131; *Bronson v. Kinzie*, 1 How. 311; *McCracken v. Hayward*, 2 id. 608; *Curran v. Arkansas*, 15 id. 305; *Hawthorn v. Calef*, 2 Wall. 10; *Tomlinson v. Jessup*, 15 id. 454; *Beer Co. v. Mass.*, 7 Otto, 25; *Ruggles v. Illinois*, 108 U. S. 527; *Railroad Commission Cases*, 116 U. S. 307; *Comm. v. Farmers' Bk.*, 21 Pick. 542; *Troy R. R. Co. v. Kerr*, 17 Barb. 603; *Suydam v. Moore*, 8 id. 358; *White v. Syracuse R. R. Co.*, 14 id. 560; *North. R. R. Co. v. Miller*, 10 id. 282; *Erie v. Casey*, 26 Penn. St. 301; *Penn. College Cases*, 13 Wall. 190; *McLaren v. Pennington*, 1 Paige, 101; *Greenwood v. Freight Co.*, 105 U. S.

Statement of case.

17; *Mumma v. Potomac Co.*, 8 Peters, 281; *Worcester v. Worcester Co.*, 109 Mass. 103; *Railroad v. Georgia*, 98 U. S. 359; *R. R. Co. v. Maine*, 96 id. 499.) Broadway was never condemned by the exercise of the power of eminent domain, but the fee of that street is in the abutting owners on it, the street is merely one the user of which was dedicated by their predecessors in ownership. (*Knox v. Mayor, etc.*, 55 Barb. 404, 410, 411.) To have the effect of being personal and exclusive a consent must state expressly on its face that it is intended to be a consent only to the particular assignment or under-letting consented to. It is not sufficient that it, in terms, names only a particular assignment or sub-letting to a specifically named person. (*Dakin v. Williams*, 17 Wend. 447; 21 id. 457; *Siefke v. Koch*, 31 How. 383; *Murray v. Harway*, 56 N. Y. 337, 343.) The "consent act" cannot be held valid and constitutional to preserve the consent and order, but invalid and unconstitutional so far as it gives the benefit of the preservation thereof to the city. (*People v. Kenney*, 96 N. Y. 294, 302, 303; *People ex rel. City of Rochester v. Briggs*, 50 id. 553.)

William C. Gulliver for James A. Richmond and others, respondents. This action rests entirely on the alleged dissolution of the corporation by the repeal act. (*People v. O'Brien*, 103 N. Y. 657.) It can be prosecuted only for the purpose of enforcing a right of the People. (*People v. Alb. & Sus. R. R. Co.*, 57 N. Y. 161; *People v. Brooklyn, F. & C. I. R. R. Co.*, 89 id. 75, 93.) No arbitrary power of repeal exists in the legislature. (*Yick Wo v. Hopkins*, 118 U. S. 356, 369; *Wilkinson v. Leland*, 2 Pet. 627, 657; Code, §§1797-1813; Cooley on Const. Lim. 85-88, 91, 175, 391; Sedg. on Stat. Constr. [2d ed.] 16, 121, 132; *Kilbourne v. Thompson*, 103 U. S. 168, 190; *Dash v. Van Kleeck*, 7 Johns. 477, 502, 508; *Wynehamer v. People*, 13 N. Y. 378, 391; *People ex rel. McDonald v. Keeler*, 99 id. 463, 480; *Morrill v. Sherburne*, 1 N. H. 199, 204; *Sinking Fund Cases*, 99 U. S. 700, 721, 761; *Fletcher v. Peck*, 6 Cranch, 87, 136; *Ervine's Appeal*.

Statement of case.

16 Penn. St. 256, 266; *Holden v. James*, 11 Mass. 396, 405; *Simonds v. Simonds*, 103 id. 572; *Lewis v. Webb*, 3 Me. 326, 336; *Cummings v. State of Missouri*, 4 Wall. 277, 323; *People v. Draper*, 15 N. Y. 532, 545; *State of Maryland v. Balt. & O. R. R. Co.*, 3 How. 534, 549, 551.) The legislative power of repeal does not include the power to inflict punishment by destroying a corporate life or otherwise. (*Kilbourne v. Thompson*, 103 U. S. 168, 182; U. S. Const., fourteenth amend. § 1; N. Y. Const., art. 1, § 6; U. S. Const., art. 1, § 10; Cooley on Const. Lim. 261; *Cummings v. State of Missouri*, 4 Wall. 277, 319, 320, 323, 325, 329; *Ex parte Garland*, 4 id. 333, 377, 380; *Drehman v. Stifle*, 8 Wall. 595, 601; *Santa Clara County v. S. P. R. Co.*, 118 U. S. 394, 396; *Yick Wo v. Hopkins*, Id. 356, 368.) It is not possible for the legislature, by reservations contained in its statutes, to exempt itself from the direct prohibitions of the Constitution, adopted not only for the protection of individuals, but also as important features of public policy. The legislature cannot do indirectly what it is forbidden to do directly. (*Cummings v. State*, 4 Wall. 277, 325, 329; *Ex parte Garland*, Id. 333, 380; *People ex rel. Bolton v. Albertson*, 55 N. Y. 50, 55, 57, 67; *In re Jacobs*, 98 id. 98; *People ex rel. Schenectady, etc., v. Allen*, 42 id. 404, 412, 413; *Atkinson v. Marietta, etc., R. R. Co.*, 15 Ohio St. 21, 35; *Taylor v. Comrs. of Rose Co.*, 23 id. 22; *Barron v. Burnside*, 121 U. S. 186.) The repeal act is unconstitutional because it impairs the obligation of contracts. (*New Jersey v. Yard*, 95 U. S. 104, 113.) Under the Constitution of this state the Broadway Company could not be dissolved by a special act. (*Cummings v. State*, 4 Wall. 277, 325; *People ex rel. Schenectady, etc., v. Allen*, 42 N. Y. 404, 413.) That which is within the intent of a constitutional prohibition, is as much within the prohibition as that which is within its letter. (*People ex rel. Bolton v. Albertson*, 55 N. Y. 50, 55, 57; *Kilbourne v. Thompson*, 103 U. S. 168; *In re Jacobs*, 98 N. Y. 98, 110; *McCracken v. Hayward*, 2 How. 608; *Edwards v. Kearzey*, 96 U. S. 595; *Austin v. Murray*, 16 Pick. 121, 126; *Watertown v. Mayo*, 109 Mass.

Statement of case.

315, 319; *Slaughter House Cases*, 16 Wall. 36, 87; Cooley on Const. Lim. 487, 488.) The purpose and scope of article 8, section 1 of the New York Constitution is to put into practical application the principle of equality of rights. (*Johnson v. H. R. R. Co.*, 49 N. Y. 455; 2 Hough's Amer. Const. 811-813.) The passage of chapter 252, Laws of 1884, is itself a declaration of the legislature and conclusive evidence that in its judgment the objects of the corporation could be attained under a general law. (N. Y. Const. art. 3, § 18, as amended November 3, 1874; *In re Thirty-fourth St. R. R. Co.*, 37 Hun, 442, 446; 102 N. Y. 343, 348; *State v. Cincinnati*, 20 Ohio State, 18, 36.) The theory that general purposes of public policy should be at the foundation of all grants of corporate powers involves the theory that similar principles should be the basis of their revocation. (Cooley on Const. Lim. 393; *Tomlinson v. Jessup*, 15 Wall. 454, 458; 99 U. S. 700, 749; *Providence Bk. v. Pitman*, 4 Peters, 514, 561; *People ex rel. Adsit v. Allen*, 42 N. Y. 378, 384.) A reservation of the alleged right of repeal sought to be exercised by the legislature in this case was not attempted to be reserved by its contract with the Broadway Surface Railroad Company. (*Greenwood v. Freight Co.*, 105 U. S. 13, 17.) The reservations of the power to repeal charters and annul or dissolve corporations, contained in the Revised Statutes and the general railroad law, do not make such special legislation valid. (*Reciprocity Bank*, 22 N. Y. 9, 14; *Humphrey v. Pegues*, 16 Wall. 244, 248.) The courts, in the construction of statutes, are guided by considerations of justice and of public policy. (*People ex rel. West. F. Ins. Co. v. Davenport*, 91 N. Y. 574, 585, 587; *Cochran v. Van Sur'ay*, 20 Wend. 365, 382; *In re Empire Bk.*, 19 N. Y. 199, 213, 214; *Dash v. Van Kleeck*, 7 Johns. 477, 495, 496; *Smith v. People*, 47 N. Y. 330, 336, 337; *In re Rochester Water Comrs.*, 66 id. 413; *People ex rel. Bolton v. Albertson*, 55 id. 50; *Pennington v. Coxe*, 2 Cranch, 33, 52; *People v. Utica Ins. Co.*, 15 Johns. 358, 381; *Oates v. Nat. Bk.*, 100 U. S. 239,

Statement of case.

244.) The court will, if possible, so construe a statute that it shall be constitutional. (*People ex rel. Bolton v. Albertson*, 55 N. Y. 50, 56; *Bd. of Sup'rs. of Seneca v. Allen*, 99 id. 532, 538.) Reservations of power to repeal will not be broadly construed. (*New Jersey v. Yard*, 99 U. S. 104, 112, 113.) In construction, general provisions give way to special, and such as have received from the legislature a special consideration in their application to a particular case prevail in that case. (*McKenna v. Edmonstone*, 91 N. Y. 231; *In re Central Park*, 50 id. 83; *Vandenburg v. Vil. of Greenbush*, 60 id. 1; *Whipple v. Christian*, 80 id. 523; *Excelsior P. Co. v. Lacey*, 63 id. 422, 425.) The provisions of section 1 of the act of 1884, referring to the provisions of the Revised Statutes, give to them no additional binding force as to corporations formed under the act of 1884, since they are applicable to all corporations formed after their enactment, unless it is otherwise provided by the legislature. (1 R. S., chap. 18, tit. 3, § 2; *Bowen v. Lease*, 5 Hill, 221, 226; *Home for Friendless v. Rouse*, 8 Wall. 430, 438; *R. R. Co. v. Maine*, 96 U. S. 499, 510.) The arbitrary power claimed by the plaintiff to be reserved by the Revised Statutes and the general railroad act of 1850, and its exercise by the repeal act, are unconstitutional, because conflicting with the fourteenth amendment of the Constitution of the United States. (*Santa Clara County v. S. Pac. R. R. Co.*, 118 U. S. 394, 396; *Barbier v. Connolly*, 113 id. 27, 31; *Yick Wo v. Hopkins*, 118 id. 356, 367, 368.) Chapter 268 of the Laws of 1884 is constitutional, nevertheless the effect of that act is no other or greater than to repeal the franchise to be a corporation. (*New Jersey v. Yard*, 95 U. S. 104, 113; *State v. Minton*, 23 N. J. L. 529, 532; *Smith v. People*, 47 N. Y. 330, 337, 339, 340; *Chase v. Lord*, 77 id. 1; *In re Rochester Water Comrs.*, 66 id. 413.) The provisions allowing the mortgaging and leasing of the property and franchises created a contract not only between the state and the corporation, but also between the state and the bondholders and lessees. (*Brooklyn Park Comrs. v. Armstrong*, 45 N. Y. 234, 246, 247; *Curran v. Arkansas*, 15 How. 305,

Statement of case.

314, 316. *Hawthorne v. Caleb*, 2 Wall. 10, 22, 23; *Woodruff v. Trapnall*, 10 How. 190, 205, 206; *Co. of Scotland v. Thomas*, 94 U. S. 682, 693.) The fact that no corporation is in a position to receive these franchises at the moment of annulment of the franchise to be a corporation does not prevent their survival. (*People v. B., F. & C. I. R. R. Co.*, 89 N. Y. 75; *N. O., etc., R. R. Co. v. Delamore*, 114 U. S. 501; *Metz v. Buffalo, etc., R. R. Co.*, 58 N. Y. 61.) The survival of such franchises and the title to them in the hands of individuals has been asserted in the courts of this state. The exercise of them by individuals as trustees, or as officers of the court, is familiar. That such franchises are property is a familiar principle. (*West River Bridge Co. v. Dix*, 6 How. 507; *R., etc., R. R. Co. v. L. R. R. Co.*, 13 id. 71; *Sixth Avenue R. R. Co. v. Kerr*, 72 N. Y. 330, 332.) The assignability of such franchises is abundantly established. (*Metz v. B., C. & P. R. R. Co.*, 58 N. Y. 61; *People v. B., F. & C. I. R. R. Co.*, 89 id. 75; *N. O., etc., R. R. Co. v. Delamore*, 114 U. S. 501, 507-510; *Branch v. Jessup*, 106 id. 468, 478, 486; *Tomlinson v. Branch*, 15 Wall. 460, 464-466; *Atkinson v. M. & C. R. R. Co.*, 15 Ohio St. 21, 36; *Clark v. Barnard*, 108 U. S. 436, 449; *W. U. T. Co. v. U. P. R. Co.*, 3 Fed. Rep. 423, 425; *M. & L. R. R. Co. v. Dow*, 19 id. 388, 392; *Shepley v. Att. & St. L. R. R. Co.*, 55 Me. 395, 407; *K. & P. R. R. Co. v. P. & K. R. R. Co.*, 59 id. 9, 23; *Miller v. R. & W. R. R. Co.*, 36 Vt. 452, 488-494; *Bank of Middlebury v. Edgerton*, 30 id. 190; *R. R. Co. v. Co. of Hamblen*, 102 U. S. 273, 277; *Morgan v. Louisiana*, 93 id. 217; *Trask v. Maguire*, 18 Wall. 391; *Chaffe v. Lideling*, 27 La. Ann. 607, 610; *Memphis R. R. Co. v. Comrs.*, 112 U. S. 609.) A distinction in the matter of assignability is made between the franchise to be a corporation, and the franchises to operate, etc., the railroad. (*M. R. R. Co. v. Comrs.*, 112 U. S. 609, 619; *Hall v. S. R. R. Co.*, 21 Law Rep. 138; *Tomlinson v. Branch*, 15 Wall. 460, 465, 509, 510; *N. O., etc., R. R. Co. v. Delamore*, 114 U. S. 501, 507, 508; *Atkinson v. M. & C. R. R. Co.*, 15 Ohio St. 21, 36; *Coe v. C. P. &*

Statement of case.

I. R. R. Co., 10 id. 373, 390; *Bank of Middlebury v. Edgerton*, 30 Vt. 190; *Chaffe v. Lideling*, 27 La. Ann. 607, 610; *Branch v. Jessup*, 106 U. S. 468, 478; *Metz v. B. C. & P. R. R. Co.*, 58 N. Y. 61; *Morgan v. Louisiana*, 93 U. S. 217, 223; *People v. B., F. & C. I. R. R. Co.*, 89 N. Y. 75, 84, 85; *Trustees of Vincennes Univ. v. Indiana*, 14 How. 268, 273.) The power to operate a railroad is not necessarily a corporate right. (*Hall v. S. R. R. Co.*, 21 L. R. 138; *M. R. R. Co. v. Comrs.*, 112 U. S. 609, 619; *N. O., etc., R. R. Co. v. Delamore*, 114 id. 501, 508; *Bk. of Middlebury v. Edgerton*, 30 Vt. 190; *People v. B., F. & C. I. R. R. Co.*, 89 N. Y. 75, 84; *Metz v. B., etc., R. R. Co.*, 58 id. 61; *R. R. Co. v. Co. of Hamblen*, 102 U. S. 273, 277; *Morgan v. Louisiana*, 93 id. 217, 221; *M. & L. R. R. Co. v. Dow*, 19 Fed. Rep. 388; *Trask v. Maguire*, 10 Wall. 391, 405; *Chaffe v. Lideling*, 27 La. Ann. 607, 610; *Washington University v. Rouse*, 8 Wall. 439, 444; *D. R. R. Tax Case*, 18 id. 206, 226; *Erie R. Co. v. Penn.*, 21 id. 492, 499; *Prov. Bk. v. Pitnam*, 4 Pet. 514, 561; *Tucker v. Ferguson*, 22 Wall. 527, 575; *Bailey v. Maguire*, 22 id. 215, 226; *R. R. Co. v. Comrs.*, 103 U. S. 1, 3; *Atkinson v. Marrietta & Co.*, 15 Ohio St. 21, 26; *Branch v. Jessup*, 106 U. S. 468, 478, 486; *Coe v. C. P. & I. R. R. Co.*, 10 Ohio St. 373, 386; *Green v. Briggs*, 1 Curt. 311; *Curran v. State of Arkansas*, 15 How. 304; *Barings v. Dabney*, 19 Wall. 1; *U. P. R. R. Co. v. U. S.*, 99 U. S. 700; *Comm. v. Essex Co.*, 13 Gray, 239; *Greenwood v. Union Freight Co.*, 105 U. S. 13.) Chapter 271 of the Laws of 1886 is unconstitutional. (*Comm. v. Potts*, 79 Penn. St. 164; *In re N. Y. El. R. R. Co.*, 70 N. Y. 327, 346, 347.) The entire property of the Broadway company vested in the directors as trustees immediately upon the passage of the repeal act, if it was operative to dissolve the company. (1 R. S. 600, part 1, chap. 18, tit. 3, § 9; *Cent. City Savings Bk. v. Walker*, 66 N. Y. 424, 428; *Heath v. Barmore*, 50 id. 302, 305; *Fairchild v. Gwynne*, 14 Abb. Pr. 121, 124.) The receivership act cannot constitutionally apply to the case of the Broadway company. (Fourteenth amend., Const. of U. S.,

Statement of case.

§ 1; N. Y. Const. art. 1, § 6; *Taylor v. Porter*, 4 Hill, 140; *Westervelt v. Glegg*, 12 N. Y. 202; *Wynehamer v. People*, 13 id. 378, 392; *Kilbourne v. Thompson*, 103 U. S. 168, 182; *McCracken v. Hayward*, 2 How. 608; *Curran v. State of Arkansas*, 15 id. 305, 319; *Edwards v. Kearzey*, 96 U. S. 595; *In re Empire Bank*, 19 N. Y. 199, 216; *Watson v. N. Y. C. R. R. Co.*, 47 id. 157.) The only power to change trustees is in the courts. (*Cochran v. Van Surlay*, 20 Wend. 365; *Powers v. Bergen*, 6 N. Y. 358; *Breevoort v. Grace*, 53 id. 245.) The receivership act does not apply to the case of the Broadway company, because it applies only to those corporations which are dissolved after its passage. (Sedg. on Stat. Constr. [2d. ed.] 194, 205, 299, 302; *Powell v. Tuttle*, 3 N. Y. 396, 401; *Olmstead v. Elder*, 5 id. 144; *Benton v. Wickwire*, 54 id. 226, 228; *Johnson v. H. R. R. Co.*, 49 id. 455, 462.) The language of the statute cannot be varied by reference to the title, nor to any other matters, so as to make it retroactive. (*Hadden v. Collector*, 5 Wall. 107, 110; Sedg. on Stat. Constr. [2d. ed.] 43, 45; *Mongeon v. People*, 55 N. Y. 613, 616; Cooley on Const. Lim. 370; *Moon v. Durden*, 2 Exch. 22; *Benton v. Wickwire*, 54 N. Y. 226, 228; *People ex rel. Peake v. Supervisors Col. Co.*, 43 id. 130, 134, 135; *Dash v. Van Vleeck*, 7 Johns. 477, 502-508.) The receivership act is itself unconstitutional, as it impairs the obligation of contracts and takes property without due process of law. (*McCracken v. Hayward*, 2 How. 608; *Curran v. State of Arkansas*, 15 id. 305, 319; *Edwards v. Kearzey*, 96 U. S. 595; *In re Empire Bank*, 19 N. Y. 199, 216; *Watson v. N. Y. C. R. R. Co.*, 47 id. 157; *Kilbourne v. Thompson*, 103 U. S. 168, 182; *City of London v. Wood*, 12 Mod. 669; Mass. Decl. of Rights, art. 29; *Hall v. Thayer*, 105 Mass. 219; *Lumsden v. Milwaukee*, 8 Wis. 485, 494; *Danolds v. State*, 89 N. Y. 36, 45, 46, 50; *Lathrop v. Stedman*, 13 Blatchf. 134, 143; *Wynehamer v. People*, 13 N. Y. 378, 487; *Allen v. Louisiana*, 103 U. S. 80, 84; *Warren v. Mayor of Charleston*, 2 Gray, 84, 89; *Taylor v. Comrs. of Ross Co.*, 23 Ohio St. 22, 34.)

Opinion of the Court, per RUGER, Ch. J.

RUGER, Ch. J. It will not be unprofitable at the outset, to recall some of the prominent incidents attending the origin and operation of the Broadway Surface Railroad Company, for the purpose of obtaining a clearer view of the situation of the parties, and their relation to the subject of the action.

On May 13, 1884, that company filed articles of association and became incorporated as a street railroad company under the provisions of chapter 252 of the Laws of 1884, a general act passed to authorize the formation of such corporations, pursuant to the mode introduced by the amendment to the Constitution of 1874. By such incorporation the company became an artificial being, endowed with capacity to acquire and hold such rights and property, both real and personal, as were necessary to enable it to transact the business for which it was created, and allowed to mortgage its franchises as security for loans made to it, but having no present authority to construct or operate a railroad upon the streets of any municipality.

This right, under the Constitution, could be acquired only from the city authorities, and they could grant or refuse it at their pleasure. The Constitution not only made the consent of the municipal authorities indispensable to the creation of such a right, but, by implication, conferred authority upon them to grant the consent, upon such terms and conditions as they chose to impose, and upon the corporation the right to acquire it by purchase.

The framers of the Constitution, evidently treating the privilege as a valuable one, which should be disposed of for the benefit of the municipality, to those who would pay the highest price for it, gave the municipal authorities the exclusive right to grant the privilege, which had theretofore been exercised by the legislature alone, and authorized its acquisition by contract from such municipality.. (*In Re Cable Co.*, 109 N. Y. 32; *Mayor, etc. v. T. & L. R. R. Co.*, 49 id. 657). The subsequent legislation of the state confirms this view, for at times it has provided that such right might be sold at auction, and by chapters 65 and 642 of the Laws of 1886, makes it

obligatory upon the municipalities to dispose of such right by public auction to the highest bidder.

Previous to December 5, 1884, this company applied to the municipality of New York for authority to lay tracks and run cars over Broadway from the Battery to Fifteenth street, and on that day, by resolution of the common council, the consent of the city was given upon the terms and conditions prescribed in the resolution granting it, among which was the annual payment of a considerable sum of money to the municipality. It is conceded that the Broadway Surface Company duly accepted the grant, and fully complied with and performed all of the terms and conditions provided therein, to entitle it to acquire, construct and operate its road. We know, not only from contemporary history, but from cases which have already reached this court, that serious questions have arisen, with reference to the propriety of the means by which the corporators of the company obtained this consent from the municipal authorities, but they are not involved in this case and have no bearing upon the questions presented for discussion by the record. They were neither alleged in the complaint, supported by proof, or presented in the arguments of counsel. The company subsequently obtained the favorable report of a commission duly appointed by the Supreme Court in lieu of the consent of abutting property owners, and the order of the court confirming the action of the commissioners. ✓

After its incorporation the Broadway Surface Company mortgaged its property and franchises as security for contemplated loans, and authorized its bonds to be put upon the market for sale to the public generally and they were largely purchased by investors, without notice of any defect in their origin or execution. It also made contracts with other street railroad companies owning, respectively, lines of road connecting with the contemplated line of the Broadway Surface Company and diverging therefrom to distant parts of the city, for the use of their several tracks by each other, for which it received a large present pecuniary consideration from each of said companies besides the exchange of mutual benefits and accommodations.

Opinion of the Court, per RUGER, Ch. J.

It is not disputed but that upon the entry of the order of confirmation, the Broadway Surface Railroad Company became vested with the right of constructing a railroad on Broadway, and running cars thereon, to as full an extent as it had power to acquire, or the state and city authorities had authority to grant.

In the spring of 1885 the company caused its track to be constructed over the route authorized, and from that time to the 4th day of May, 1886, when it was dissolved by an act of the legislature, in connection with other railroad companies, ran its cars over such road and the connecting lines.

On May 14, 1886, in an action between the People, as plaintiff, and James A. Richmond, the former president of the Broadway Surface Railroad Company, as sole defendant, upon the application of the attorney-general, one John O'Brien was appointed receiver of the property formerly belonging to the Broadway Surface Company, by a justice of the Supreme Court of the third judicial district, in an *ex parte* order based upon the summons and complaint in that action, in pursuance of and under the authority alone of the provisions of chapter 310 of the Laws of 1886.

The present action was a supplementary action brought July 8, 1886, by the attorney-general in the name of the People of the State against the city of New York, the receiver of the Broadway Surface Railroad Company, and numerous other corporations and persons, alleged to have had dealings with such company, either as stockholders, mortgagees, creditors or contractors, for the purpose of obtaining a judgment declaratory of the rights and liabilities of the several parties, as affected by the dissolution of the corporation, determining the fact as to what were assets of the company, and the extent of the interests of the several parties therein, and restraining the mortgagees, contractors and others from taking legal proceedings to enforce their rights in, and liens upon the property of the corporation.

It is not claimed that the state has any legal interest in the determination of these questions, or that the receiver has not

Opinion of the Court, per RUGER, Ch. J.

ample power at law to obtain possession of such assets as he may be entitled to, or to protect the property of the corporation from unlawful claims. It is claimed that the action is maintainable under the provisions of section 1 of chapter 310 of the Laws of 1886, by virtue of the provision making it the duty of the attorney-general, upon the dissolution of a corporation by legislative action, "immediately thereafter to bring a suit to wind up and finally settle and adjust the affairs of such annulled and dissolved corporation."

The complaint shows that previous to the commencement of this action the attorney-general had brought a suit, in accordance with the statute, to wind up the affairs of the corporation; that a receiver had been appointed therein, and that such action was still pending undetermined. It then proceeds to allege that in consequence of various enumerated difficulties in obtaining possession of the property by the receiver, this action was brought "in aid of the former action to prevent a multiplicity of suits and to carry out the provisions of chapter 310 of the Laws of 1886."

It is not easy to see on what theory such an action can be maintained. The state has no interest entitling it to intervene to prevent a multiplicity of actions between other parties. ✓ Neither does the action seem necessary or proper in aid of the former action.

The mode by which the provisions of chapter 310 are to be carried out are specially provided by that act, to be through the instrumentality of a receiver, and it is not claimed that the receiver lacked power to litigate and settle any of the questions presented by this complaint. The receiver might, perhaps, have brought an action similar in character to this, and would have had a legal interest, if any, in the property to be affected by it; but the state has no such interest and has no greater authority to intervene in the litigation of controversies between individuals and corporations than any other indifferent party. (*People v. Booth*, 32 N. Y. 397; *People v. Ingersoll*, 5S id. 13; *Matter of the N. Y. Elevated R. R.*,

Opinion of the Court, per RUGER, Ch. J.

70 id. 339; *People v. B., F. & C. I. R. R. Co.*, 89 id. 93; *People v. A. & S. R. R. Co.*, 57 id. 161.)

It is claimed that this court held in *People v. O'Brien* (103 N. Y., 657), that the action was maintainable. We think that claim is unfounded. The question was not involved in the motion there considered. That was a motion to change the place of trial of the action. Whether the complaint stated a good cause of action or not, could not have been properly considered or decided on such a motion.

This action is certainly unusual, and is believed to be unprecedented in its scope and design; and, if held to lie at all, presents a strong and unfavorable contrast to the mode in which legal controversies are usually brought to the attention of judicial tribunals. Some members of the court, however, are of the opinion that the right of the People to maintain the action depends wholly upon the question of the constitutionality of chapter 310 referred to and requiring the consideration of that question.

Considering, therefore, the magnitude of the interests affected and the importance to the public generally of a speedy determination of the questions, involving the right of operating a street railroad on Broadway, notwithstanding the dissolution of the corporation to which that right was originally granted, we refrain from disposing of the case upon the ground referred to, and proceed to an examination of the questions upon which such right depends.

Their determination involves an inquiry into the rights secured by the mortgagees and bondholders through the mortgages upon the property and franchises of the railroad company; the validity of the traffic contracts made by it with other street railroad corporations, and the effect which the legislation of 1886, comprised in chapters 268, 271 and 310 had upon such questions. In other words, we think the material question for discussion here is whether the franchise to maintain tracks and run cars on Broadway survived the dissolution of the corporation, and if so, upon whom the right of administering its affairs devolved.

Opinion of the Court, per RUGER, Ch. J.

Upon the trial of the action a judgment was rendered in favor of the defendants, except the receiver, to the effect that the mortgages were valid liens upon the property and franchises of the company and survived the dissolution of the corporation; that the traffic contracts were made by authority of law and could be enforced notwithstanding the dissolution of the corporation; and that chapter 271 and parts of chapter 310 of the Laws of 1886, were unconstitutional, as violative of the restrictions of the fundamental law in relation to legislation impairing the obligation of contracts, and constituting a taking of "property without due process of law."

The court also held that this action was maintainable in the name of the People; that a receiver of the property of the dissolved corporation had been lawfully appointed; that he was entitled to take possession of its property and wind up its affairs, and that the plaintiffs were entitled to a perpetual injunction restraining all of the defendants, except the receiver, from proceeding with actions already begun, or from instituting other proceedings or actions to enforce, maintain or assert any of the claims, demands or rights of action affecting in any manner the affairs, property, rights and privileges of the Broadway Surface Railroad Company which have been tried and determined in this action. Not only the plaintiff, but each of the defendants, except the Broadway and Seventh Avenue Railroad Company, appealed from this judgment to the General Term. That court affirmed the judgment of the trial court.

The plaintiff and all of the defendants, except the two railroad corporations, appeal from the judgment of affirmance to this court, and thus bring before us every determination involved in the judgment.

A review of the judgment brings up for consideration propositions very grave in character, not only on account of the extent of the private interests affected, but because their determination will affect great public questions arising out of

Opinion of the Court, per RUGER, Ch. J.

the limitations imposed by the Constitution upon the legislative power, over the property of corporations lawfully acquired.

The statutes upon which the action is predicated, confessedly assume the right and power of the legislature to wrest from the company its franchises; to transfer them to other persons, and bestow their value upon the donees of the state. The statutes contemplate the absolute destruction of the property of the corporation, and the loss of its value to the creditors who have made loans in good faith upon the security of such property, and this action is avowedly prosecuted to accomplish the purposes of the legislation. It is, therefore, urgently contended by the attorney-general that none of the franchises of the corporation survived its dissolution, and that the mortgages previously given thereon, as well as all contracts made with connecting street railroads for the mutual use of their respective roads, fell with the repeal and could not be enforced.

If it could be supposed for a moment, that this claim was reasonably supported by authority, or maintainable in logic or reason, it would give grave cause for alarm to all holders of corporate securities.

The contention that securities representing a large part of the world's wealth are beyond the reach of the protection which the Constitution gives to property, and are subject to the arbitrary will of successive legislatures, to sanction or destroy at their pleasure or discretion, is a proposition so repugnant to reason and justice as well as the traditions of the Anglo-Saxon race in respect to the security of rights of property, that there is little reason to suppose that it will ever receive the sanction of the judiciary, and we desire in unqualified terms to express our disapprobation of such a doctrine. Whatever might have been the intention of the legislature or even of the framers of our Constitution in respect to the effect of the power of repeal reserved in acts of incorporation, upon the property rights of a corporation,

such power must still be exercised in subjection to the provisions of the Federal Constitution.

Considering the power which the state has to terminate the life of corporations organized under its laws, and the authority which its attorney-general has by suit to forfeit its franchises for misuse or abuse and to regulate and restrain corporations in the exercise of their corporate powers, there is little danger to be apprehended in the future from the overgrowth of power, or the monopolistic tendencies of such organizations, but whatever that danger may be, it is trivial in comparison with the widespread loss and destruction, which would follow a judicial determination, that the property invested in corporate securities, was beyond the pale of the protection afforded by the fundamental law.

It is not perhaps strange, in the great variety of cases bearing upon the subject, and the manifold aspects in which questions relating to corporate rights and property have been presented to the courts that dicta, couched in general language, may be found giving color to the plaintiff's claim ; but we think that there are no reported cases in which the judgment of the court has ever taken the franchises or property of a corporation from its stockholders and creditors, through the exercise of the reserved power of amendment and repeal, or transferred it to other persons or corporations, without provision made for compensation.

Among other claims made by the state, it is contended that the stated term of one thousand years prescribed in its charter, for the duration of the company, constitutes a limitation upon the estate granted, and that, therefore, the corporation took a qualified estate only in its franchises, and that the rights reserved by the Revised Statutes (Laws of 1884 and 1850), and the Constitution to alter, amend and repeal the charters or laws under which corporations might be organized, also constituted a limitation upon the estate granted, and that the exercise of the right of repeal by the state accomplished the destruction of the corporation and the annihilation of all franchises acquired under its charter.

Opinion of the Court, per RUGER, Ch. J.

It will be convenient in the first instance to consider the nature of the right acquired by the corporation under the grant of the common council, with respect to its terms or duration. This is to be determined by a consideration of the language of the grant and the extent of the interest which the grantor had authority to convey. We think this question has been decided by cases in this court, which are binding upon us as authority in favor of the perpetuity of such estates. That a corporation, although created for a limited period, may acquire title in fee to lands or property necessary for its use was decided in *Nicoll v. New York and Erie Railroad Company* (12 N. Y. 121), where it was held that a railroad corporation, although created for a limited period only, might acquire such title, and that where no limitation or restriction upon the right conveyed was contained in the grant, the grantee took all of the estate possessed by the grantor.

The title to streets in New York is vested in the city in trust for the People of the State, but under the Constitution and statutes it had authority to convey such title as was necessary for the purpose, to corporations desiring to acquire the same for use as a street railroad. The city had authority to limit the estate granted either as to the extent of its use or the time of its enjoyment, and also had power to grant an interest in its streets for a public use in perpetuity, which should be irrevocable. (*Yates v. Van De Bogert*, 56 N. Y. 526; *In re Cable Co.*, *supra*.)

Grants similar in all material respects to the one in question have heretofore been before the courts of this state for construction, and it has been quite uniformly held that they vest the grantee with an interest in the street in perpetuity, for the purposes of a street railroad. (*People v. Sturtevant*, 9 N. Y. 263; *Davis v. Mayor, etc.*, 14 id. 506; *Milhau v. Sharp*, 27 id. 611; *Mayor, etc., v. Second Ave. R. R. Co.*, 32 id. 261; *Sixth Ave. R. R. Co. v. Kerr*, 72 id. 330.)

Other cases are also reported in the books, but it is deemed unnecessary to accumulate authorities on this point.

Opinion of the Court, per RUGER, Ch. J.

In *Milbau v. Sharp*, Judge SELDEN said, with reference to a grant from the common council of New York in no material respect differing from this: "It amounted to an immediate grant of an interest, and it would seem of a freehold in the soil of the street to the defendants. The rails, when laid, would become a part of the real estate, and the exclusive right to maintain them perpetually is vested in the defendants, their successors and assigns. I say perpetually, because there is no limitation in point of time to the continuance of the franchise, and no direct power is reserved to the corporation to terminate it. * * * The title to the rails when permanently attached to the land, and such right in the land as may be requisite for their perpetual maintenance, are, therefore, granted to the defendants by the resolution."

Judge COMSTOCK, in *Davis v. Mayor, etc.*, said: "As the consideration for constructing the road the ordinance clearly contemplates that it is to become the private property of the associates. They alone will be entitled to place their cars upon it, and within a maximum limit they can charge what they please for the carriage of passengers. These rights are in effect granted in perpetuity."

In the case of *Mayor, etc., v. Second Avenue Railroad Company* (32 N. Y. 272), it was said: "Assuming that the common council had power to make the grant, then its acceptance by Pearsall and his associates, signified by the execution of the agreement with the conditions annexed thereto, and the duties and obligations resulting therefrom, invested the latter with the right of property in the franchise which the common council could not take away or impair by any subsequent act of its own."

The resolution of the common council in this case expressly provided for traffic contracts by which the Broadway and Seventh Avenue Railroad Company should obtain a right to run cars over the tracks of the Broadway Surface Railroad, and no conditions upon the right granted to the Broadway Surface Railroad Company, in respect to the duration of such contract rights or otherwise, were imposed by the terms of the

grant. It was clearly contemplated by its provisions that the rights granted should be exercised in perpetuity, if public convenience required it, by that corporation, or those who might lawfully succeed to its rights.

When we consider the mode required by the statutes and the Constitution, to be pursued in disposing of this franchise, the inference as to its perpetuity seems to be irresistible, for it cannot be supposed that either the legislature or the framers of the Constitution intended to offer for public sale property the title to which was defeasible at the option of the vendor, or that such property could be made the subject of successive sales to different vendees, as often as popular caprice might require it to be done.

Neither can it be supposed that they contemplated the resumption of property, which they had expressly authorized their grantee to mortgage and otherwise dispose of, to the destruction of interests created therein by their consent.

We are, therefore, of the opinion that the Broadway Surface Railroad Company took an estate in perpetuity in Broadway through its grant from the city, under the authority of the Constitution and the act of the legislature. It is also well settled by authority in this state that such a right constitutes property within the usual and common signification of that word. (*Sixth Ave. R. R. Co. v. Kerr*, 72 N. Y. 330; *People v. Sturtevant*, 9 id. 263.)

When we consider the generality with which investments have been made in securities based upon corporate franchises throughout the whole country; the numerous laws adopted in the several states providing for their security and enjoyment, and the extent of litigation conducted in the various courts, state and federal, in which they have been upheld and enforced, there is no question, but that in the view of legislatures, courts and the public at large, certain corporate franchises have been uniformly regarded as indestructible by legislative authority, and as constituting property in the highest sense of the term.

It is, however, earnestly contended for the state that such a franchise is a mere license or privilege enjoyable during the life of the grantee only, and revocable at the will of the state. We believe this proposition to be not only repugnant to justice and reason, but contrary to the uniform course of authority in this country. The laws of this state have made such interests taxable, inheritable, alienable, subject to levy and sale under execution, to condemnation under the exercise of the right of eminent domain, and invested them with the attributes of property generally.

We will refer to a few only of the statutes on this subject from which the implication arises not only that the state intended to invest these franchises with the character of property, but also to enable their mortgagees, purchasers and assigns to enjoy their use under an indefeasible title. Thus railroad corporations have been authorized to contract with other corporations for a qualified transfer of such franchises for terms unlimited except by the agreement of the parties (Chap. 218, Laws of 1839; § 2, chap. 1843, Laws of 1872; § 15, chap. 252, Laws of 1884); to pledge them by way of mortgage as security for loans (sub. 10, § 28, Laws of 1850); to consolidate with other companies owning, connecting and continuous lines of railroad, and continue the use of such franchises under the name of their successors. (Chap. 108, Laws of 1875; *Shields v. Ohio*, 95 U. S. 319.) Mortgagees and others have been authorized to purchase such franchises upon mortgage sale and otherwise, and afforded the right to organize so as to enjoy their use thereafter. (§ 1, chap. 444, Laws of 1857; chaps. 469 and 710, Laws of 1873; chap. 113, Laws of 1880; chap. 430, Laws of 1874.) Purchasers upon a mortgage or execution sale have been authorized to form associations for the purpose of continuing the operation of such railroad with all its powers, privileges and franchises. (§ 1, chaps. 469 and 710, Laws of 1873; § 1, chap. 282, Laws of 1854.) The sale of such franchises has been authorized by the municipality where located to parties proposing to build street railroads.

Opinion of the Court, per RUGER, Ch. J.

(Constitutional amendment of 1875; § 7, chap. 252, Laws of 1884; chaps. 62 and 66, Laws of 1886.) And by section 15 of the act under which this corporation was organized, such companies were expressly permitted to lease or transfer their rights and franchises to other street railroad corporations. Indeed, it is matter of public history that one-half of the railroads of the state are now operated by organizations other than those to whom the franchises were originally granted, notwithstanding their dissolution, through transfers effected by the foreclosure of mortgages and otherwise.

The statutes cited, as well as others not specially referred to, indicate the general policy of the state to render such interests independent of the life of the original corporation and transferable as property by means of judicial proceedings and otherwise, under certain restrictions not pertinent to our present purpose particularly to consider. (*People v. Brooklyn F. & C. I. R. R. Co.*, 89 N. Y. 84.)

In *Mayor, etc. v. Second Avenue Railroad Company* (32 N. Y. 261), Judge BROWN said: "The rights of municipal corporations to property in lands and its usual incidents, and to create ferries and railroad franchises, are quite distinct and separate from their duties as legislatures, having authority to pass ordinances for the control and government of persons and interests within the city limits. The latter are powers held in trust, as all legislative powers are, to be used and exercised for the benefit and welfare of the whole community while the former are property, in the ordinary sense, to be acquired and conveyed in the same manner as natural persons acquire and transfer property."

The same learned judge said in *Brooklyn Central Railroad Company v. Brooklyn City Railroad Company* (32 Barb. 364): "The grant to the city railroad company and its acceptance on the conditions annexed, with the duties and obligations and large expenditures resulting therefrom, would seem, therefore, upon the principles I have endeavored to state, to invest the company with the right of property in the fran-

Opinion of the Court, per RUGER, Ch. J.

chise of which it cannot be deprived without its consent or against its will."

It was held by this court in *Langdon v. Mayor, etc.* (93 N. Y. 129), that a grant from the city of land to be used as a wharf, carried with it, as a necessary incident and appurtenance, a right of way for vessels over adjoining waters to the wharf, and that under such grants the property granted can only be resumed by the grantor when needed for public use by the exercise of the right of eminent domain.

The court also held in *People v. Brooklyn, Flatbush & Coney Island Railroad Company* (89 N. Y. 75), that upon a foreclosure of the property and franchises of a railroad corporation, an individual could lawfully become their purchaser, and could hold and transfer them to any corporation having or acquiring the right to exercise such franchises.

In *Sixth Avenue Railroad Company v. Kerr* (72 N. Y. 330), it was held that the right of a street railroad company in the use of a street for the purpose of its business, was a property right subject to condemnation for public use. As we have already seen, the cases of *People v. Sturtevant, Mayor, etc.*, v. *Sixth Avenue Railroad*, *Davis v. Mayor, etc.*, and *Milhan v. Sharp*, herein before referred to, sustain the same views.

The case of *N. O. S. F. & Lake R. R. Co. v. Delaware* (114 U. S. 501), is directly in point. There the franchise, as here, was acquired by the corporation from the municipal authorities of a city under general laws authorizing the formation of street railroad corporations. It was held, "where there has been a judicial sale of railroad property under a mortgage, authorized by law, covering its franchises, it is now well settled that the franchises necessary to the use and enjoyment of the railroad pass to the purchaser. * * *

It follows that if the franchises of a railroad corporation, essential to the use of its road, and other tangible property, can by law be mortgaged to secure its debts, the surrender of its property upon the bankruptcy of the company carries the

Opinion of the Court, per RUGER, Ch. J.

franchises and they may be sold and pass to the purchaser at the bankruptcy sale."

In *Memphis and Louisville Railroad Company v. Railroad Commissioners* (112 U. S. 609, 619), it was said: "The franchise of being a corporation need not be implied as necessary to secure to the mortgage bondholders or the purchasers at a foreclosure sale, the substantial rights intended to be secured. They acquire the ownership of the railroad and the property incident to it and the franchise of maintaining and operating it as a road."

These rights of property having been acquired and created under the express sanction and authority of the state, it remains to inquire whether they were defeasible and subject to be taken away through the exercise of any power reserved by the state to alter, amend and repeal laws or charters.

The reservations applying to this case are claimed to be as follows: 1st. Section 1, article 8, title "Corporations, how created" (Constitution of 1846) providing that, "all general laws and special acts passed pursuant to this section may be altered from time to time or repealed." 2d. Section 8, title 3, chapter 18 of the Revised Statutes (7th ed.), providing that "the charter of every corporation that shall be granted by the legislature, shall be subject to alteration, suspension and repeal in the discretion of the legislature." 3d. Section 48, chapter 140, Laws of 1850, providing that "the legislature may at any time annul or dissolve any incorporation formed under this act, *but such dissolution shall not take away or impair any remedy given against any such corporation, its stockholders, or officers for any liability which shall have been previously incurred.*" And 4th. Chapter 282, Laws of 1884, under which this corporation was organized, giving it all the powers and privileges granted, and subject to all of the liabilities imposed by chapter 140, Laws of 1850, and the several acts amendatory thereof, and further providing that "the legislature may at any time alter, amend or repeal this act." (§ 19.)

The Constitution of 1846 for the first time introduced restrictions upon the power of legislatures to grant special

charters, and required that provisions for corporations, save in exceptional cases, should thereafter be made by general laws. The obvious intent of the constitutional reservation was to remove any doubt as to the power of the legislature to amend or repeal the laws, whether general or special, authorized by that instrument for the formation of corporations, and seemed to leave the provisions of the Revised Statutes, in relation to reserved power over charters, in full force and effect.

It will be observed that the Constitution, and the act of 1884 provide specially for the amendment and repeal of statutes alone, but the Revised Statutes, and the act of 1850 are addressed specially to the subject of the annulment and repeal of charters created under such statutes.

It seems to us that these provisions relate to different subjects, viz.: The repeal of laws, and the annulment of charters formed under such laws, and that the power to do one, does not naturally or properly include the power to do the other. (*Albany Northern R. R. Co. v. Brownell*, 24 N. Y. 345.)

Certainly the repeal of a law authorizing corporations, would not destroy organizations formed under it, nor would the annulment of a charter affect the law under which it was created. Neither does it seem reasonable to suppose, while taking away the power of the legislature to create corporate bodies, the Constitution intended to confer power to destroy them, thus enabling them to accomplish indirectly, that which they were precluded from doing directly. It must be assumed that the framers of the Constitution, as well as the legislature, used the language employed by them intelligently and according to its common and customary signification, and when they spoke of the annulment and repeal of acts and laws alone, did not intend to embrace charters as well. These two subjects have frequently been the occasion of legislative action, and since the restrictions upon the powers of the legislature to grant special charters, there is no reason to suppose that they did not use the language employed in its literal sense, and especially so when both subjects, were immediately within the contemplation of the law makers.

In considering this question, the provisions of the Revised Statutes may be laid out of view, for if they contain any broader power than the act of 1850, they must be deemed to have been repealed by the provisions of the latter act, as inconsistent therewith. The reservations, therefore, which apply to this case are contained in the acts of 1850 and 1884, which constitute a part of the railroad charter.

These acts should be read and construed together, and, as thus considered, provide that the legislature may at any time alter, amend and repeal these acts, and may also annul and dissolve charters formed thereunder, but such dissolution shall not take away or impair any remedy against such corporation, its officers and trustees, for any liability previously incurred. The contract proved between the corporation and the state was intended, in respect to a repeal of the charter, to survive the dissolution of the corporation, and to determine the rights of parties interested in the property, in the event of dissolution. By virtue of this contract the corporation secured rights subject to be taken away under certain restrictions, and protected itself from any consequences following a repeal of its charter, except those expressly agreed upon.

But even if it be conceded that the constitutional provisions place the right to repeal charters, as well as laws, beyond the power of legislatures to waive or destroy, the question still remains as to the effect of such a repeal upon the franchises of the corporation; whether it contemplates anything more than the extinction of the corporate life, and consequent disability to continue business, and exercise corporate functions after that time, or has a wider scope and effect.

It may be assumed in this discussion that the authority of the legislature to repeal a charter, if it has expressed its intention to reserve such power in its grant, constitutes a valid reservation. Parties to a contract may lawfully provide for its termination at the election of either party, and it may, therefore, be conceded that the state had authority to repeal this charter, provided no rights of property were thereby invaded or destroyed. In speaking of the franchises of a

corporation we shall assume that none are assignable except by the special authority of the legislature. We must also be understood as referring only to such franchises as are usually authorized to be transferred by statute, viz., those requiring for their enjoyment the use of corporeal property, such as railroad, canal, telegraph, gas, water, bridge and similar companies, and not to those which are in their nature purely incorporeal and inalienable, such as the right of corporate life, the exercise of banking, trading and insurance powers, and similar privileges. The franchises last referred to being personal in character and dependent upon the continued existence of the donee for their lawful exercise, necessarily expire with the extinction of corporate life, unless special provision is otherwise made. (*People v. B., F. & C. I. R. R. Co.*, 89 N. Y. 84; *People v. Metz*, 50 id. 61.)

In the former class it has been held that at common law real estate acquired for the use of a canal company could not be sold on execution against the corporation separate from its franchise, so as to destroy or impair the value of such franchise. (*Gue v. Tide Water Canal Co.*, 24 How. [U. S.] 257), and by parity of reasoning it must follow that the tracks of a railroad company, and the franchise of maintaining and operating its road in a public street, are equally inseparable, in the absence of express legislative authority providing for their severance.

The statute of our state authorizing the sale of the franchise and property of a railroad company on execution, seems to recognize the indissolubility of the connection between the corporeal property, and its incorporeal right of enjoyment.

It is also to be observed that in none of the provisions for repeal in this state is there anything contained, which purports to confer power to take away or destroy property or annul contracts, and the contention that the property of a dissolved corporation is forfeited, rests wholly upon what is claimed to be the necessary consequence of the extinction of corporate life. We do not think the dissolution of a corporation works any such effect. It would not naturally seem to

Opinion of the Court, per RUGER, Ch. J.

have any other operation upon its contracts or property rights than the death of a natural person upon his. (*Mumma v. Potomac Co.*, 8 Pet. 281, 285.)

The power to repeal the charter of a corporation cannot, upon any legal principle, include the power to repeal what is in its nature irrevocable, or to undo what has been lawfully done under power lawfully conferred. (*Butler v. Palmer*, 1 Hill, 335.)

The authorities seem to be uniform to the effect that a reservation of the right to repeal, enables a legislature to effect a destruction of the corporate life, and disable it from continuing its corporate business (*People ex rel. Kimball v. B. & A. R. R. Co.*, 70 N. Y. 569; *Philips v. Wickham*, 1 Paige, 590), and a reservation of the right to alter and amend confers power to pass all needful laws for the regulation and control of the domestic affairs of a corporation, freed from the restrictions imposed by the Federal Constitution upon legislation impairing the obligation of contracts. (*Munn v. Illinois*, 94 U. S. 113, 123.)

We think no well considered case has gone further than this, while in many cases such power has been expressly held to be limited to the effect stated. In the language of Chief Justice MARSHALL in *Fletcher v. Peck* (6 Cranch, 87, 135): "If an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made; those conveyances have vested legal estates, and if those estates may be seized by the sovereign authority, still that they originally vested is a fact, and cannot cease to be a fact. When, then, a law is in the nature of a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights."

It would seem to be quite obvious that a power existing in the legislature by virtue of a reservation only, could not be made the foundation of an authority to do that which is expressly inhibited by the Constitution, or afford the basis of a claim to increase jurisdiction over the lives, liberty or prop-

Opinion of the Court, per RUGER, Ch. J.

erty of citizens beyond the scope of express constitutional power.

Since the decision of the celebrated *Trustees Dartmouth College v. Woodward* (4 Wheat. 518), the doctrine that a grant of corporate powers by the sovereign, to an association of individuals, for public use constitutes a contract, within the meaning of the Federal Constitution, prohibiting state legislatures from passing laws impairing its obligations, has, although sometimes criticised, been uniformly acquiesced in by the courts of the several states as the law of the land, and may be regarded as too firmly established to admit of question or dispute. (*People v. Sturtevant, supra*; *Milbau v. Sharp, supra*; *Brooklyn Cent. R. R. Co. v. Brooklyn City R. R. Co., supra*.) The intimation, by Judge STORY, in that case, that the rule might be otherwise if the legislature should reserve the power of amending or repealing it, led to the adoption by the legislatures of the various states, of the practice of incorporating such reservations in acts of incorporation. Whatever may be the effect of such reservations, it is immaterial whether they are embraced in the act of incorporation or in general statutes or provisions of the Constitution. In either case they operate upon the contract according to the language of the reservation. (Mora-wetz on Corp. 464.) It is manifest, therefore, that in the absence of such reserved power, legislatures have no authority to violate, destroy or impair chartered rights and privileges, or power over corporations, except such as they possess by virtue of their legislative authority over persons and property generally. It is obvious that this reserved power does not, in any sense, constitute a condition of the grant, and cannot have effect as such, but is simply a power to put an end to the contract, with such effect upon the rights of the parties thereto as the law ascribes to it. (*Sinking Fund Cases*, 99 U. S. 700, 748; *Tomlinson v. Jessup*, 15 Wall. 454, 457.) In speaking of the exercise of this power by congress in the *Sinking Fund Cases*, Chief Justice WAITE says: "Congress not only retains but has given special notice of its intention to retain full and complete

Opinion of the Court, per RUGER, Ch. J.

power to make such alterations and amendments of the charter as come within the just scope of the legislative power. That this power has a limit no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made. * * * Whatever rules congress might have prescribed in the original charter for the government of the corporation in the administration of its affairs, it retained the power to establish by amendment. In doing so it cannot undo what has already been done, and it cannot unmake contracts that have already been made, but it may provide for what shall be done in the future and may direct what preparation shall be made for the due performance of contracts already entered into. It might originally have prohibited the borrowing of money on mortgage, or it might have said that no bonded debt should be created without ample provision by sinking fund to meet it at maturity. Not having done so at first, it cannot now, by direct legislation, vacate mortgages already made under the powers originally granted, nor release debts already contracted."

The judges dissenting in that case contended that the reserved power could not be construed as authorizing the alteration, violation or nullification of any of the material provisions of the grant, but should be held to mean simply a reservation of the power to legislate, freed from the restrictions imposed by the constitutional provisions against legislation impairing the obligations of contracts. Mr. Justice BRADLEY said: "The reserved power in question is simply that of legislation, to alter, amend or repeal a charter. This is very different from the power to violate or to alter the terms of a contract at will. A reservation of power to violate a contract, or alter it, or impair its obligation, would be repugnant to the contract itself and void. A proviso repugnant to the granting part of a deed, or to the enacting part of a statute, is void. Interpreted as a reservation of the right to legislate, the reserved power is sustainable on sound principles; but inter-

puted as the reservation of the right to violate an executed contract it is not sustainable."

This dissent proceeded upon the ground that the acts of congress under consideration changed some of the essential features of the contract, and were, therefore, void, as being obnoxious to the provisions of the Constitution for the protection of life, liberty and property. The majority of the court held, however, that such acts were simply an exercise of the power of congress to regulate the internal administration of the affairs of a corporation, which, to a certain extent, it was unanimously agreed that it possessed. There was no dispute or disagreement as to the correctness of the rule stated, that the power of amendment and repeal was a restricted power, limited by the provisions of the Constitution. An interpretation conferring the power of violating a contract at will upon one of its parties, under a clause authorizing its amendment or repeal, would seem to be inconsistent with any reasonable notion of the nature of such an instrument, and beyond the power of parties lawfully to create.

If it is possible to conceive the idea of a repealable grant, certainly such a grant, accompanied with power to convey or pledge the interest granted, must, on the execution of the power, necessarily preclude a resumption by the grantor of the subject of the grant, or any right of property acquired under it. An express reservation by the legislature of power to take away or destroy property lawfully acquired or created would necessarily violate the fundamental law, and it is equally clear that any legislation which authorizes such a result to be accomplished indirectly, would be equally ineffectual and void.

In *People v. National Trust Company* (82 N. Y. 287), the question was raised that a dissolved corporation was discharged from the obligation to pay rent accruing upon a lease subsequent to its dissolution. Judge RAPALLO said: "This claim is not founded upon the allegation of any payment, release or surrender, or anything affecting the merits of the claim, but upon the sole ground that by the dissolution of the corporation the lease was terminated and the covenant to pay

Opinion of the Court, per RUGER, Ch. J.

rent ceased to be obligatory. We do not regard the dissolution as having any such effect. Under the statutes of this state, on the dissolution of a corporation, its assets become a trust fund for the payment of its debts, and these include debts to mature as well as accrued indebtedness, and all engagements entered into by the corporation which have not been fully satisfied or canceled."

In *Commonwealth v. Essex Company* (13 Gray, 239), Justice SHAW said: "When, under power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted." (*Albany R. R. Co. v. Brownell*, 24 N. Y. 345.)

The case of *City of Detroit v. Detroit and F. Plank-road Company* (43 Mich. 140), is not only in point, but entitled to high consideration on account of the distinction as a constitutional lawyer of the learned judge who wrote the opinion of the court. The question was whether the legislature had power to compel the defendant to remove its toll-gates from within the city limits after they had been lawfully placed there under the provisions of its charter. Judge COOLEY says: "It cannot be necessary at this day to enter upon a discussion in denial of the right of the government to take from either individuals or corporations any property which they may rightfully have acquired. In the most arbitrary times such an act was recognized as pure tyranny, and it has been forbidden in England ever since Magna Charta, and in this country always. It is immaterial in what way the property was lawfully acquired, whether by labor in the ordinary vocations of life, by gift, or descent, or by making a profitable use of a franchise granted by the state, it is enough that it has become private property, and it is thus protected by the 'law of the land.'"

And, finally, upon this branch of our subject, we are unable to see why section 48 of the law of 1850 does not express the rule by which the question under discussion must be determined. That section is expressly made a part of the

Opinion of the Court, per RUGER, Ch. J.

contract between the state and corporations organized thereunder, and specially provides for the effect which an exercise of the reserved power of repeal by the state shall have upon the franchises of the company. It shall not impair any remedy existing against the corporation, its directors or officers upon a liability previously incurred. This was the contract under which the dissolved corporation issued its stock, mortgaged its franchises, entered into traffic engagements and contracted debts. Creditors, contractors and stockholders had a right to rely upon the promise of the state, that the annulment of the corporate charter, should not affect the remedies existing in their favor against the corporation, and this promise is a contract protected by the provisions of the Federal Constitution.

In the absence of any constitutional provision prescribing the effect of such repeal, it was competent for the legislature to declare what that should be, and for the state to contract with reference to such a declaration. The right of repeal, as provided by the Constitution, is fully recognized by the act of 1850, and the effect of the exercise of the power upon the rights of parties affected thereby, is clearly defined.

We are, therefore, of opinion that the statute not only prescribes the rule, creates the contract, and regulates the rights of the parties upon the exercise by the state of the power of repeal, but it also correctly formulates the principle of law applicable to the situation. We think it necessary to refer only to some of the leading cases cited by the plaintiff's attorney in support of his argument, and are of the opinion that they are not controlling authorities upon the case under consideration. That of *Greenwood v. Freight Company* (105 U. S. 13), was an action by a stockholder in the Marginal Company against the Freight Company and others, to obtain an injunction restraining the latter company from taking possession of the railroad tracks of the former after its dissolution by legislative action, and running cars thereon. The Marginal Company had refused to assert its rights, and the stockholder was, therefore, allowed to bring his suit to protect his

Opinion of the Court, per RUGER, Ch. J.

interest in its property. Judge MILLER says in that case: "Personal and real property acquired by the corporation during its lawful existence, rights of contract, or choses in action so acquired, and which do not in their nature depend upon the general powers conferred by the charter, are not destroyed by such a repeal, and the courts may, if the legislature does not provide some special remedy, enforce such rights by the means in their power. The rights of the shareholders of such a corporation to their interests in its property are not annihilated by such a repeal and there must remain in the courts the power to protect those rights." It was further held that, so far as the law then under consideration authorized one corporation to take and use the property or franchises of another, it was sustainable under the provisions requiring compensation to be made therefor, under the power of eminent domain.

Neither has the case of *People v. Globe M. L. Ins. Company* (91 N. Y. 174), any bearing upon the questions involved in this discussion. It was held in that case that contracts for personal services contemplated the continued existence of the parties, and when either of them died it necessarily effected a termination of such contracts.

So, too, cases depending upon the effect of conditions in a grant to the creation of corporate life or the acquisition of property rights thereunder are, for obvious reasons, foreign to the questions involved here.

Here the grantee has performed every condition essential to its creation as a corporate being and its capacity to acquire and hold property, and the only question is as to the effect of a power to extinguish the corporate life, reserved in its charter, upon its property rights.

In *Erie & N. E. Railroad Company v. Casey* (26 Penn. St. 287, 301), the question arose under a statute which specially provided that the state might resume all rights conferred in case of an abuse or misuse of the powers granted to the corporation. Upon an alleged abuse of power, the legislature repealed the charter and resumed the subject of the grant.

Opinion of the Court, per RUGER, Ch. J.

The corporation forfeited its rights by its voluntary act. The reservation in the charter was expressly made a condition subsequent. The case was between the representative of the state and the railroad corporation, and no rights of creditors, mortgagees or stockholders were involved in its decision. It also appears by the case that the state and the corporation had settled their controversy by compromise during the pendency of the litigation, and it can hardly be said to have involved any practical question.

We are, therefore, of the opinion that the Broadway Surface Company took an indefeasible title to the land necessary to enable it to construct and maintain a street railroad in Broadway, and to run cars thereon for the transportation of freight and passengers, which survived its dissolution. ✓

We are thus brought to the question of the right of succession to the property of a dissolved corporation in the absence of any provision in the act of dissolution providing for such an event. ✓

Sections 9 and 10, title 3, chapter 18, part 1 Revised Statutes (pp. 132, 153 [7th ed.]), seem to furnish a conclusive solution to the inquiry. They read as follows: "Sec. 9. Upon the dissolution of any corporation created or to be created, and unless other persons shall be appointed by the legislature, or by some court of competent authority, the directors or managers of the affairs of such corporation *at the time of its dissolution*, by whatever name they may be known in law, shall be the trustees of the creditors and stockholders of the corporation dissolved, and shall have full power to settle the affairs of the corporation, collect and pay the outstanding debts, and divide among the stockholders the moneys and other property that shall remain after the payment of debts and other necessary expenses." "§ 10. The persons so constituted trustees, shall have authority to sue for and recover the debts and property of the dissolved corporation * * * and shall be jointly and severally responsible to the creditors and stockholders of such corporation to the extent of its property and effects that shall come into their hands." ✓ ✓ ✓

Opinion of the Court, per RUGER, Ch. J.

✓ From these sections it would seem that upon the dissolution of this corporation, its remaining trustees became vested with the title of its property, and responsible to its creditors and stockholders for the value thereof. By operation of law a vested right of action accrued to all creditors and stockholders immediately on the dissolution against such trustees for the value of all property, which did or might by the exercise of reasonable diligence come into their hands. This was a ✓ liability which after it once attached was beyond the constitutional power of the legislature to release or discharge. (*Dash v. Vankleeck*, 7 Johns. 577.)

The evidence is undisputed that upon the dissolution, declared by the legislature, the trustees took possession of the railroad property and surrendered its operation to the mortgagees of such railroad. This, in the absence of any objection on the part of creditors or stockholders, they had undoubted authority to do, and the possession of such mortgagees thereafter was the possession of such trustees. They undoubtedly became liable for the value of such property to creditors and stockholders by virtue of such possession, and their authority to administer the assets of the corporation for the purpose of discharging such liability became fixed by the law existing at the time the liability was incurred. The cases in this state fully support these propositions. As was said by the chancellor in *Kain v. Bloodgood* (7 Johns. Ch. 90, 128): "The reasonable construction of the act is that the trustees succeeded to all the rights and privileges of directors and to the same means of defense."

In *McLaren v. Pennington* (1 Paige, 102), it was held, as ✓ stated in the head-note, that "where an act of incorporation is repealed, all the property and rights of the corporation become vested in the directors then in office, or in such persons as by law have the management of the business of the corporation, in trust for the stockholders and creditors, unless the ✓ repealing law provides for the appointment of other persons than the officers of the corporation as trustees."

In *Heath v. Barmore* (50 N. Y. 305), Judge RAPALLO

Opinion of the Court, per RUGER, Ch. J.

said: "Under the provisions of 1 Revised Laws, 248 and 1 Revised Statutes, 600, sections 9 and 10, upon the dissolution of a corporation, the directors or managers at that time become trustees of its property (unless some other custodian is appointed) for the purpose of paying the debts of the corporation and dividing its property among its stockholders, and these provisions apply as well to the real estate as to the personal property of corporations. Consequently, where lands are conveyed absolutely to a corporation having stockholders, no reversion or possibility of a reverter remains in the grantor."

ALLEN, J., in *Central City Savings Bank v. Walker* (66 N. Y. 428), speaking of the ownership of property and the property rights of a corporation, said: "During the life of the corporation the body corporate was the legal owner, and upon the expiration of the charter the legal title vested in the trustees in office, at the time, in trust, for the creditors and stockholders."

There can be no valid distinction between property held in trust and that owned by individuals in respect to the protection afforded to it by the Constitution. The reason for its protection is equally strong in either case, and the inviolability of the title is in both cases beyond the reach of legislative action. (*Trustees Dartmouth College v. Woodward, supra.*)

It then remains for us to consider the validity of the provisions of chapters 271 and 310 of the Laws of 1886. We are fully impressed with the importance of this question, and the well-settled principles of construction which require every statute to be so construed as to uphold its constitutionality, if that may be done by a fair and reasonable interpretation of its language.

Another rule, equally well settled, precludes courts from inquiring into the motives of legislatures in making laws, and to consider them simply with reference to their legal effect, upon the rights of persons subjected to their operation.

If, however, upon such examination it is found that constitutional rights will be invaded by the operation of the

statute, it is the duty of courts to protect them by declaring the invalidity of the statute.

Upon such examination we are of the opinion that chapter 271 of the Laws of 1886 is unconstitutional and void. Its provisions show a naked and undisguised attempt to take away from the Broadway Surface Company and its stockholders and creditors, its property and bestow the benefit thereof upon the municipality of New York. The act attempts to preserve the validity of the consents held by the corporation notwithstanding its dissolution, and directs their sale and transfer to the purchaser, and the payment of the purchase-price to the city.

These consents were the muniments of title to the enjoyment of the rights acquired thereunder by the railroad corporation, and could not be lawfully retained in existence or transferred except by its consent, manifested in some of the ways provided by law. Their possession by any lawful transferee would entitle him to the exercise and use of the rights thereby conferred. The attempt to transfer them to a third party by the mere force of the statute, without the consent or knowledge of their lawful owners, was an effort to change their ownership without due process of law. (*Parker v. Browning*, 8 Paige, 388.)

Such legislation has been frequently and emphatically condemned. (*Taylor v. Porter*, 4 Hill, 147; *Wynehamer v. People*, 13 N. Y. 434; *Westervelt v. Gregg*, 12 id. 202; *Kilbourn v. Thompson*, 103 U. S. 168.)

In speaking of the reserved power to alter, amend and repeal laws authorizing incorporations, in *People v. Boston and Albany Railroad Company* (70 N. Y. 570), Judge EARL says: "Under this reserved power the legislature may impose upon railroad corporations such additional restrictions and burdens as the public good requires. It may not confiscate property, but it cannot be doubted that it may do all that is required by the act of 1874."

Judge THOMPSON said in *Dash v. Van Vleeck* (7 Johns. 477): "It is repugnant to the first principles of justice, and

Opinion of the Court, per RUGER, Ch. J.

the equal and permanent security of rights, to take by law the property of an individual without his consent and give it to another."

The main argument presented to maintain the constitutionality of this act, is the assertion that these consents do not constitute property within the usual signification of that term. We have considered that question and do not agree with the claim. In view of the fact that the statute expressly contemplates their sale, transfer and acquisition by a purchaser, it would seem unnecessary to go further to prove the fallacy of such a contention.

These remarks apply with equal force to chapter 310. The plaintiff has argued the case upon the assumption that the chapter referred to applies to the Broadway Surface Railroad Company, and should control the proceedings to wind up its affairs. That company was, however, dissolved on January fourth, and the act now under consideration was not passed until January eleventh thereafter and could not have retroactive effect unless its language expressly required it. We can see no ground for such a contention, unless we look beyond the language of the act and speculate as to the motives of the legislature in passing it. The act does not purport, in terms, to have a retroactive operation, and it is contrary to settled principles to give it such, unless there is something in the language of the act requiring this to be done.

Section 1 provides; "Whenever any corporation organized under the laws of this state shall be annulled and dissolved by an act of the legislature, it shall be the duty of the attorney-general * * * to bring a suit * * * to wind up the affairs of the corporation."

This language looks plainly to prospective cases arising under the act, and those only, and there is nothing in the body of the act to show that the legislature intended it to apply to a dissolution already accomplished.

The character of a statute is to be determined by its provisions, and not by its title (*People v. McCann*, 16 N. Y. 58), but when its language is ambiguous and doubtful, resort may

Opinion of the Court, per RUGER, Ch. J.

be had to its title and the occasion of its enactment, to explain an ambiguity in its terms. There is no ambiguity in the terms of this act, and nothing to indicate an intention to give it retroactive operation. The application of the act to the Broadway Surface Company can be sustained only upon the theory that such act applies to all corporations whatsoever, theretofore dissolved by legislative act, however remote in point of time such dissolution may have been effected. Whether there are such cases or not we are not informed, but we are invited to adopt a rule which would relate back and cover such cases if they exist.

We think such a decision would conflict with settled rules of construction. In *New York and Oswego Midland Railroad Company v. Van Horn* (57 N. Y. 473), it was held that a legislative intent to violate the Constitution will not be assumed, nor will a law be so construed as to give it a retroactive effect when it is capable of any other construction; and that if all of its language can be satisfied by giving it prospective operation only, that construction will be given to it.

In the case of *Dash v. Van Kleeck* (*supra*), it was decided that it is a principle of universal jurisprudence that laws, civil and criminal, must be prospective, and cannot have a retroactive effect; and in *Benton v. Wickwire* (54 N. Y. 229), the court declared that neither original statutes nor amendments can have any retroactive effect unless, in exceptional cases, the legislature so declare. (*People v. Supervisors*, 43 N. Y. 130; *People v. McCall*, 94 id. 587; *N. Y. & O. M. R. R. Co. v. Van Horn*, 57 id. 473.) The power of the legislature to give retroactive operation to a statute in some cases is conceded, but we believe that, to have such effect, it should declare its purpose in plain and unmistakable language, and that so unusual a signification should not be attributed to it by resorting to vague and equivocal inferences which have no support in the language employed. Such an interpretation would most emphatically be forbidden when it would interfere with vested rights. If we were at liberty to inquire into the circumstances under which this act was passed, and its connec-

Opinion of the Court, per RUGER, Ch. J.

tion with other legislation of the same period, we might conjecture that the legislature designed it to apply to the Broadway Surface Railroad Company; but it has not so expressed itself in the act, and the rules of construction, to which we have referred, forbid us from supplying the language necessary to give it such effect. (*Benton v. Wickwire*, 54 N. Y. 226.) But, assuming that the act was intended to apply and retroactive effect be given to it, we are of opinion that its material provisions are open to many serious objections which cannot be obviated or reconciled with the provisions of the fundamental law.

A receiver is the representative of the debtor. It is his duty to scrutinize the claims made against the estate and reject and defend against those he believes to be unfounded or illegal. He cannot be impartial in a litigation between himself and creditors as to such claims. A law, therefore, which makes such a party the referee to take the proof of claims, and the judge to determine the materiality of evidence offered in their support, violates a fundamental rule in the administration of justice. No man can be a judge in his own case, and it is immaterial whether he is a party in his own right or as trustee of an express trust; in either event he is a party to the action, interested therein and precluded from acting in a judicial capacity in the determination of such a case. *Nemo debet esse iudex in propria causa*. This law is objectionable also because it makes proof of the cost of the obligation the measure of the creditor's recovery, instead of the liability of the debtor as shown by the terms of his contract. And, again, it requires the creditor to accept payment of an obligation before maturity. The time of payment of a pecuniary obligation is a material provision in such contract, and we know of no authority to require a creditor to accept payment in advance, any more than one to compel such payment by the debtor. Each party has the right to stand on the letter of his contract, and perform it according to its terms. But an objection to this act, even more serious than those considered, is found in the provision for the appointment of a receiver of

Opinion of the Court, per RUGER, Ch. J.

the property of the dissolved corporation, and the transfer of its assets to him by force of the statute, after the title thereto had become vested in its directors.

It will not be claimed that the appointment of such a receiver by the court in an action against a stranger, without notice to the trustees, in the absence of the authority conferred by chapter 310, would confer upon him title to property previously vested in others. (*Parker v. Browning, supra.*) We cannot see how this case differs from the one supposed. The only authority the court had for making the appointment was derived wholly from the provisions of this act and the court was not thereby invested with any judicial authority or discretion, except that of designating the holder of the title assumed to be transferred by the act. The court has, by virtue of its general jurisdiction over trusts, authority to appoint to a vacant trusteeship, and perhaps, for cause, to remove fraudulent, dishonest or incompetent trustees, and appoint others to perform the duties of the trust in order to avoid a failure thereof; but we know of no authority for a court to appoint a receiver of property vested in trustees, without cause and without notice to them, or opportunity afforded to defend their title and possession. As was said by Judge EARL in *Stuart v. Palmer* (74 N. Y. 184): "Due process of law requires an orderly proceeding adapted to the nature of the case, in which the citizen has an opportunity to be heard and to defend, enforce and protect his rights. A hearing and an opportunity to be heard is absolutely essential. We cannot conceive of due process of law without this." And the chancellor had previously said in *Verplanck v. M. Insurance Company* (2 Pai. 450). "Another fatal objection to the regularity of these proceedings is that the appellants were deprived of the possession of their property without having an opportunity of being heard, and without any sufficient cause for such a summary proceeding. By the settled practice of the court in ordinary suits, a receiver cannot be appointed, *ex-parte*, before the defendant has had an opportunity to be heard in relation to his rights." (*Devoe v. Ithaca & O. R. R. Co.*, 5 Paige, 521;

Opinion of the Court, per RUGER, Ch. J.

Ferguson v. Crawford, 70 N. Y., 256.) As we have seen, the property of this corporation vested in the persons who were its directors at the time of its dissolution. They took it as trustees for stockholders and creditors, and were not made parties to the action in which the receiver was appointed. No legislation can authorize the appointment of a receiver of the property of A in an action against C, without violating the provisions of the Constitution in relation to the taking of property without due process of law. That the legislature might amend the provisions of the Revised Statutes in relation to the devolution of property of dissolved corporations is indisputable, and if it had done so in the act of dissolution, or previously, it would undoubtedly have prevented the vesting of the property in trustees; but this it did not do, and it had no authority, by mere force of legislative enactment, to take vested property from one individual or trustee and give it to another. (*McLean v. Pennington*, *supra*; *Trustees Dartmouth College v. Woodward*, *supra*.)

These conclusions must result in the condemnation of the scheme by which it was attempted to wind up the affairs of the Broadway Surface Railroad Company, as the provision for bringing an action by the attorney-general to wind up its affairs was incidental merely, and so intimately connected with the general plan of the scheme, that it cannot be supposed it would have been enacted except in connection with the other provisions of the act. We, therefore, think this law is obnoxious to the objection, that it assumes to take property without due process of law, and impairs the obligation of contracts. The questions as to the rights of the several parties under the traffic contracts are not before us in such form as to authorize us to pass definitely upon them; but we may properly, in this action, determine their validity so far as any objections are made to them by the plaintiff in this action. The plaintiff has not alleged any want of power on the part of the defendant corporations, to run cars over the Broadway Surface Railroad under their respective charters, and that question must be left until the attorney-general arraigns them in a

Opinion of the Court, per RUGER, Ch. J.

direct action for usurpation. (*People v. B., F. & C. I. R. R. Co.*, 89 N. Y. 93 ; *Denike v. N. Y. & R. L. & C. Co.*, 80 id. 599.)

It is claimed that the contract with the Broadway and Seventh Avenue Railroad is void because it is made with a company owning a parallel railroad. The trial court found that it was parallel to the Broadway Surface Railroad. Assuming, for the purposes of this decision, that this was a question of fact and not of law, and that we are bound by the finding, we do not conceive that fact to be conclusive on the question. The material ground upon which the contention is based is the proviso to section 15, chapter 252, Laws of 1884, authorizing companies organized thereunder to lease or transfer their rights to run upon or over any portion of their railroad tracks, to any other street surface railroad company authorized to run upon such route. The proviso is that the section should not be construed to authorize any of such companies "to lease its rights or franchises" to any other company owning and operating a road parallel thereto.

By these contracts the Broadway Surface Railroad acquired the right from the Broadway and Seventh Avenue Railroad, and from the Twenty-third Street Railroad Company, to run cars and make a continuous trip for a single fare, to the termination of their respective roads, over the tracks of such roads, and such roads, from their respective points of connection, were thereby respectively authorized to run cars over the Broadway Surface Railroad. That these rights were valuable and enured largely to the convenience and benefit of the traveling public is not now denied.

The uniform course of legislation in reference to street railroads, shows a policy on the part of the state to facilitate arrangements for the connection of continuous lines, and the transfer of passengers from one road to another, with the view of giving the longest service possible to the public without increase of fare. It can hardly be supposed that the legislature while expressly making provisions for such facilities intended to proscribe companies connecting with another road, which happened to own a line parallel for a certain portion of its

Opinion of the Court, per RUGER, Ch. J.

length, but which also owned other lines extending beyond the parallel portion, from the benefits to be derived from a traffic contract. It seems to us that the obvious intent of this provision was to avoid the monopoly of parallel lines, and prevent the acquisition by one railroad company of the exclusive possession and control of such lines. It, therefore, prohibits leases to parallel roads. This does not and, in our judgment, was not intended to preclude such companies from making traffic contracts for the partial use of their respective routes, beyond the line of parallelism. These contracts were not in terms or in effect leases of such rights, and did not surrender possession or control of the road by its original owner. Such contracts were also authorized by chapter 218 of the Laws of 1839, and we do not consider that statute to have been repealed by the proviso of the act of 1884 or other legislation on the subject.

There are many other interesting and important questions presented by the briefs of the able counsel for the respective parties which it might be proper to discuss, were it not that the demands made by the claims of practical litigation, upon our time are so imperative as to forbid the consideration of abstract and speculative investigations. Such questions must be left to occasions when parties actually aggrieved present them in a litigation where their consideration is essential to the determination of rights. The views expressed lead to a denial of the relief sought in the action by the plaintiff.

The judgments of the Special and General Terms should be reversed and the complaint dismissed, with costs to the defendant other than the receiver.

All concur, except PECKHAM and GRAY, J. J., not sitting.

ANDREWS and EARL, JJ., concur in the result upon these grounds: (1.) The annulling act is constitutional and valid, and its effect was only to take the life of the corporation. (2.) All the property of the corporation, including its street franchises and its mortgages and valid contracts, including what are called the traffic contracts with other railway companies survived. (3.) The act chapter 271 is unconstitutional.

Statement of case.

(4.) That act and the act chapter 310 are parts of the same scheme adopted by the legislature for the purpose of winding up the affairs of the corporation and disposing of and distributing its property. The main features of the latter act are unconstitutional and void, and thus so much of the legislative scheme has failed that there is not enough left to save the whole act from condemnation. (5.) As the latter act is thus wholly void, and this action is founded and depends solely upon it, there is no warrant for its maintenance; and, therefore, the judgment should be reversed and complaint dismissed.

All concur.

Judgment accordingly.

In the Matter of the Estate of JOHN MCGRAW, Deceased.

In the Matter of the Estate of JENNIE MCGRAW FISKE, Deceased.

The provision of the Revised Statutes limiting the amount of property which incorporated colleges may take and hold by gift, grant or devise (1 R. S. 460, § 36), is not confined to colleges incorporated by the regents of the university under the general laws of the state, but applies also to such an incorporation created by special charter, unless inconsistent provisions are to be found in the charter.

The provisions of the act of 1840 (Chap. 318, Laws of 1840) as amended in 1841 (Chap. 261, Laws of 1841), authorizing the creation of trusts to incorporated colleges, by grants, devises or bequests, do not repeal or affect the general law limiting the amount of property which may be taken and held by such a corporation.

The distinction between the taking and holding of property by corporations recognized in relation to English corporations, subject to the mortmain laws of that country, is not applicable in this state.

Where, in a special charter granted to an institution of learning, a limitation is put upon its power to hold property, in the absence of some plain and controlling circumstance showing a contrary legislative intent, it must be construed as limiting the taking, as well as holding beyond the amount specified; and a devise or bequest to it, exceeding the amount or value it is permitted to take, is void for the excess.

Accordingly *held*, that the provision of the charter of Cornell University (§ 5, chap. 585, Laws of 1865), declaring that the corporation

111	66
117	563
117	66
140	586
111	66
151	338

Statement of case.

thereby created might hold property "not exceeding \$3,000,000 in the aggregate," prohibited its taking, as well as holding beyond that amount; and, it appearing that the university already held property up to the limit, that a bequest to it was void; also, *held*, that the heirs or next of kin of the testatrix could raise the question.

Leasure v. Hillegas (7 S. & R. 313); *Baird v. Bank of Washington* (11 id. 411); *Goundie v. N. W. Co.* (7 Penn. St. 233); *Runyan v. Carter* (14 Pet. 123); *Smith v. Shelley* (12 Wall. 358); *Bogardus v. Trinity Church* (4 Sand. Ch. 633); *Humbert v. Trinity Church* (24 Wend. 587); *De Camp v. Dobbins* (29 N. J. Eq. 36; S. C., 31 id. 671); *Davis v. O. C. R. R. Co.* (131 Mass. 259); *Vidal v. Girard's Ex'rs.* (2 How. [U. S.] 127); *In re N. Y. E. R. R. Co.* (70 N. Y. 337); *Moore v. B. C. R. R. Co.* (108 id. 96), and other cases holding the doctrine that one who has contracted with or conveyed to a corporation for a consideration will not be heard to raise the question as to its power to take, distinguished.

Also, *held*, that the question was not affected by the fact that subsequent to the death of the testatrix the limitation on the power of said university to take was removed by the legislature.

This state having, by act of its legislature (Chap. 460, Laws of 1863), accepted the grant of land made to it by the act of congress "donating the public lands to the several states and territories which may provide colleges for the benefit of agriculture and the mechanic arts" (Chap. 130, U. S. Laws, 1862) as a compliance on its part with one of the conditions of the grant, chartered said university. In the charter the income, revenue and avails received from the investment of the proceeds of the sale of the land scrip were appropriated to the university and were to be paid over to its trustees. In 1866 the legislature passed an act (Chap. 481, Laws of 1866), authorizing the comptroller to sell the scrip at not less than thirty cents per acre to the trustees of said university; in case said trustees did not contract for the purchase, then the same was to be sold by the commissioners of the land office to any person or persons. The sale in either case to be on condition and under an agreement with the purchaser that the net avails of the sale of the scrip, or of the lands located under it, should be paid over and devoted to the purposes of said university. The trustees having failed to purchase, said commissioners entered into a contract with C. for the purchase by the latter of the scrip then undisposed of. By the agreement C. contracted to purchase at thirty cents per acre, to be paid on delivery of the scrip, to locate and sell the land and pay the net proceeds, less the amount paid, into the state treasury. From such net proceeds it was agreed that a sum equal to an additional thirty cents per acre should be added to and form part of the fund known as the "College Land Scrip Fund," and that the remainder should constitute a separate fund to be known as the "Cornell Endowment Fund," which should "be the property of the Cornell University," the principal thereof to remain forever unimpaired, the income to be

Statement of case.

annually appropriated by the legislature and paid over to the trustees of said university. Subsequently, under an agreement between C. and the university, made with the consent of the comptroller and the said commissioners, C. conveyed to the university all the rights and interests he had acquired under the said contract and the university assumed his place. Pursuant to the act of 1880 (Chap. 317, Laws of 1880), directing it, the legislature transferred to the university the moneys and securities constituting the "Cornell Endowment Fund." *Held*, that the agreement between the commissioners and C. was, in effect, a sale by the state of the scrip at thirty cents per acre, with an additional thirty cents, if so much should be realized upon sale by the vendee; and upon the transfer to him he became the legal owner; that the residue of the proceeds agreed to be paid into the state treasury was to be so paid, not as part of the purchase-price, but as profits and as the property of the university; that said agreement was fully authorized by the said act of 1886; that neither said act nor the agreement was in contravention of the act of congress; that the university by the transfer from and its agreement with C., and by receiving the moneys and securities of the Cornell Endowment Fund, by virtue of the act of 1880, became the owner of this fund and was not a debtor of the state on account thereof; and that therefore the property which thus came into the possession of the university was held by it within the meaning of its charter, and so was to be included in estimating the amount of property held by it at the time of the bequest.

(Argued June 11, 1888; decided November 27, 1888.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made August 20, 1887, which reversed a decree of the surrogate of Tompkins county on settlement of the accounts of Douglass Boardman as surviving executor of the will of John McGraw, deceased, and as executor of the will of Jennie McGraw Fiske, deceased. (Reported below, 45 Hun, 354.)

John McGraw, a resident of Ithaca, died May 4, 1877, leaving his only child and heir, Jennie McGraw, who on the 14th day of July, 1880, intermarried with Willard Fiske, and died September 30, 1881, without issue, leaving her husband surviving her.

John McGraw left a last will and testament, which has been duly admitted to probate by the surrogate of Tompkins county, and of which his daughter and Douglass Boardman,

Statement of case.

and the survivor of them, were made sole executors. His daughter, Jennie McGraw Fiske, also left her last will and testament, by which she made Douglass Boardman her sole executor, and which has been duly proven and admitted to probate by the surrogate of Tompkins county. Excepting property from about \$130,000 to \$150,000 in value, which came to her by devise and bequest of her grandfather, John Southworth, the title to the estate and property, which formed the subject of disposition by her will, came through the will of her father, John McGraw.

The will of John McGraw gave \$500,000 in trust for his said daughter, and made her residuary legatee, with full power to dispose by will of all the property left by him.

The will of Mrs. Fiske directed that her estate "be converted into money, or available securities, as soon as can be done, having in view its best interests and results." After numerous bequests, among them a bequest to Cornell University of \$50,000 in trust, to be expended, so far as necessary, in completing and perfecting the McGraw building of said University; also, to said University \$200,000 in trust, to be known as the "McGraw Library Fund," the will contained the following residuary clause: "I give, devise and bequeath all the rest, residue and remainder of my property (if any there shall be) to Cornell University, aforesaid, to be added to the 'McGraw Library Fund' aforesaid, and subject to the trusts, purposes, uses and conditions hereinbefore prescribed for said fund."

The amount of Jennie McGraw Fiske's estate at the time of her death, as found by the surrogate, including the trust fund created under the will of John McGraw, which the surrogate held was part of the estate of John McGraw, but which Mrs. Fiske had a right to dispose of by will, was,

	\$2,275,933 46
Legacies to other than Cornell University, . . .	1,121,570 00
Bequests to said University,	1,154,363 46

The further material facts are stated in the opinion.

Statement of case.

E. Countryman and *S. D. Halliday* for appellants. The ancient common law fully recognized the absolute title of the owner of real, as well as of personal, estate, and sustained his right to dispose of his property, real or personal, by deed, devise or bequest. (1 Reeves' Hist. Eng. Law [Finlayson's ed.], 10, note *a*; 19, 78-80, note 1; 73-75, 54, 55, note; 158, 159, 273, 317, 330; Allen's Royal Prerogative, 129, 142, 143; 1 Freeman's Norman Conq. 57, 58, 62-64; 5 id. 247, 248, 250, 253, 256; 2 Hallam's Mid. Ages, 278, 279, note 9; 1 Spence's Eq. Jur. 20, 98, 137, 138, 140, 141, 287, 439-444, 446, 454, 458, 461, 462 and notes, 468, 478, 490, 491; 1 Stubbs' Const. Hist. of Eng. 75, 76, 258-260, 300, 301; 3 Reeves' Hist. Eng. Law, 42, 127-131, note *a*; 138, note *a*; 142 note *a*; 172, note *a*; 172a, 220, note; 274, note *b*; 275, note *a*; 276, note *a*; 279-281, 283, note *c*; 284, 285, note *b*; 286, 361, note *a*; 363; 2 Bl. Com. 48-50; Hale's Hist. Com. Law, 97, 98; Glanville's Law and Cus. of Eng. [Beame's ed.] 138-142; Mirror of Just. chap. 1, § 3; 2 Reeves' Hist. Eng. Law, 74, 77, 129, 200, 201, 252, 253; 286, note *b*; *Jackson v. Schultz*, 18 Johns. 185; 2 Hume's Hist. of Eng. 297, 512; 1 Froude's Hist. of Eng. 21; Hume's Hist. of Eng. chap. 23, 511, 512; chap. 26, 596; *Jones v. Morley*, 1 Ld. Ray. 291; Gilbert on Uses [Introduction by Sir Edward Sugden], 43-46; *Wright v. Trustees of M. E. Church*, Hoff. Ch. 252.) At common law there was no limitation of the capacity of corporations to acquire and own real or personal estate. (1 Bl. Com. 475, 478, 479; Shelf. on Mortmain, 27; 1 Kyd. on Corp. 78, 103, 104; Grant on Corp. 98, 100; Angell on Corp. [11th ed.] §§ 110, 145; 2 Kent's Com. 281; *Page v. Heineberg*, 40 Vt. 81; *People v. La Rue*, 67 Cal. 526, 531; *Sherwood v. American Bible Society*, 4 Abb. Ct. App. Dec. 227; *Thompson v. Waters*, 25 Mich. 227.) The English statutes of mortmain related merely to real property. The provisions of these acts did not extend to Scotland or Ireland, nor to any of the colonies. (2 Kent's Com. 282; Angell on Corp. [11th ed.] §§ 143, 149; Shelf. on Mortmain, 122; *Atty-Gen. v. Stewart*, 2 Mer. 148, 161; *Fordyce v. Bridges*,

Statement of case.

2 Phill. 515; *Chamberlain Case*, 43 N. Y. 424, 434; *Despard v. Churchill*, 53 id. 192; *Vansant v. Roberts*, 3 Md. 119, 129; *Perin v. Carey*, 24 How. [U. S.] 466; *Odell v. Odell*, 10 Allen [Mass.], 6; *Potter v. Thornton*, 7 R. I. 252; *Page v. Heineberg*, 40 Vt. 81.) The mortmain acts have never been accepted as law in New York, nor probably in any other state, except partially in Pennsylvania. (2 Kent's Com. 283; *Bascom v. Albertson*, 34 N. Y. 584; Angell on Corp. [11th ed.] § 149; 3 Washb. on Real Prop. [4th ed.] 267; Green's Brice's Ultra Vires, 11, note *a*.) The several states have adopted restrictions which have been regarded as mortmain restrictions. (*Downing v. Marshall*, 23 N. Y. 386, 387.) All the powers of the court in relation to licenses, escheats and forfeitures devolved to the states. (Laws of 1879, chap. 25, § 13; Laws of 1887, chap. 36, § 5; Laws of 1792, chap. 35, §§ 5-7.) The state became the original source of title and the ultimate owner of all land to which the title failed from any cause. (1 R. S. 718, § 1; *Ogden v. Lee*, 6 Hill, 546; 5 Denio, 628.) The gift to the university is valid, unless there is a prohibition in the charter. (2 R. S. 57, § 3; 1 id. 599, § 1; *Sherwood v. Am. Bible Soc.*, 4 Abb. Ct. App. Dec. 231; *Hall v. Hall*, 81 N. Y. 131, 134, 135-137; *Stamm v. Bostwick*, 40 Hun, 38; Laws of 1840, chaps. 267, 318, §§ 1, 4; Laws of 1841, chaps. 245, 261; *Cottman v. Grace, Mayor, etc.*, 2 N. Y. State Rep. 630, 633; *Smith v. People*, 47 N. Y. 330, 339; *In re Rochester*, 66 id. 414, 422; *Whipple v. Christian*, 80 id. 523, 527.) The gift to the university for the purpose of maintaining a library, however, would not come within the provisions of the Revised Statutes against perpetuities, even if the acts of 1840 and 1841 had not been passed. (*Wetmore v. Parker*, 52 N. Y. 450, 458.) These provisions of the Revised Statutes, it is well settled, gave the university power to hold property, if obtained in any other manner than by devise, for any purpose germane to the accomplishment of the general objects of its incorporation. (2 Kent's Com. 280; 2 Dill. on Mun. Cor. [3d ed.] § 567; *Barnum v. Baltimore*,

Statement of case.

62 Md. 293; *Vidal v. Girard's Exrs.*, 2 How. [U. S.] 127; *McDonald's Exrs. v. Murdoch*, 15 id. 367; *Perine v. Cary*, 24 id. 465.) A corporation may acquire and hold lands for purposes which are incidental or auxiliary to its main objects, and, therefore, may hold such lands for sale with the view of increasing its funds. (*Swan Point Cem. v. Tripp*, 14 R. I. 199; *New Shorman v. Ball*, Id. 566, 567; *Sargent v. Cornish*, 54 N. H. 18.) As the prohibition in the Revised Statutes against a corporation taking by devise does not declare the conveyance void as in the case of an alien; it might be argued that the university, by the act of incorporation, became *ipso facto* capable of taking, so that the title would vest subject to the right of the state to declare a forfeiture for a violation of the statute. (*McManus v. Gavin*, 77 N. Y. 36; *Burnside v. Whitney*, 21 id. 149; *Bonnell v. Griswold*, 80 id. 128.) The language used in the charter having a definite meaning is not open to judicial construction for the purpose of limiting or extending it. (*Johnson Case*, 49 N. Y. 455; *McCluskey Case*, 11 id. 593, 601, 602; *Benton Case*, 54 id. 226.) The enactment of a statute, subsequent to the Revised Statutes, designating a number or class of corporations who might take by devise for particular purposes had the effect of repealing, to that extent, the prior prohibition against taking in that manner. (*White v. Howard*, 46 N. Y. 164; *Hall v. Hall*, 81 id. 131, 136.) The university, therefore, could take the entire residue given in the will, regardless of the charter limitation, but it could only hold any excess over such limit with the consent of the state. (*Runyan v. Coster*, 14 Pet. 122, 130; *Baird v. Bk. of Washington*, 11 S. & R. 411; *Barrow v. Turnpike Co.*, 9 Humph. [Tenn.] 303; *Leazure v. Hillegas*, 7 S. & R. 313; 1 Perry on Trusts, § 45; 3 Wash. on Real Prop. [4th ed.] 267; *Smith v. Sheely*, 12 Wall. 358; *Alexander v. Tolleston Club*, 110 Ill. 65; *Hough Case*, 73 id. 23; *Baker v. Neff*, 73 Ind. 68; *Lewis Case*, 53 Iowa, 110, 113; *Bushnell Case*, 11 Neb. 192, 195; *Jones v. Habersham*, 107 U. S. 175, 188; *De Camp v. Dobbins*, 29 N. J. Eq. 36, 41; *Bogardus v. Trinity Church*, 24 Wend. 630; *Christian*

Statement of case.

Union v. Yount, 101 U. S. 353; *Whitney v. Wyman*, Id. 392, 396, 397; *Nat. Bk. v. Matthews*, 98 id. 621, 629; *Nat. Bk. v. Whitney*, 103 id. 99, 102; *Fortier v. N. O. Bk.*, 112 id. 440; *Crocker v. Whitney*, 71 N. Y. 161, 170; *Eaton v. Aspinwall*, 19 id. 119; *Buffalo, etc., Co. v. Cary*, 26 id. 75; *Cayuga, etc., R. R. Co. v. Kyle*, 64 id. 185; *Whilford v. Laidler*, 94 id. 146, 151.) There is a broad distinction between a prohibition against taking, or taking and holding, and a prohibition merely against holding property above a stated amount. (Angell on Corp. § 152; Shelford on Mortmain, 2, 8, 27, 34-40, 244; 1 Kyd on Corp. 79; 1 Coke on Littleton, 2b. 99a. 98b.; Grant on Corp. 100, 101, 102, 103, 104, 132, 133; 2 Black. Com. 272, 273; Wilmot's Opinions, 9, 10; Ambler's Rep. 550, 571; *Atty-Gen. v. Bowyer*, 3 Ves., Jr. 714; 2 Fitz. Nat. Brev. 221 O, 224 H; *Hargraves v. Butler*, note, No. 108, to Coke's Littleton; 1 Powell on Devises, 165, 166; Lovelass on Wills, 256; *Flood's Case*, Hob. R. 136; *King v. Newman*, 1 Lev. 284; *Christ's College Case*, 1 W. Black. 91; *Corpus Christie College v. Bishop of London*, 2 id. 1182, 1183.) At common law an alien had the capacity to take a fee, but he could not hold it without a license as against the crown. (1 Co. Litt. 2b.; Com. Dig., Aliens, c. 2; 1 Bac. Abr., Aliens, c.; *Wright v. Sadler*, 20 N. Y. 320, 324; *People v. Conklin*, 2 Hill, 67; *Gouverneur v. Robertson*, 11 Wheat. 332; *Fairfax v. Hunter*, 7 Cranch, 602, 603, 619, 621; *Wadsworth Case*, 12 N. Y. 376; *Maynard v. Maynard*, 36 Hun, 227; *In re Malone*, 21 S. C. 436.) If the trust was valid in point of law, neither the heirs of the testator nor any other private persons could have any right to inquire into or contest the right of the corporation to take the property or to execute the trust; this right would exclusively belong to the state in its sovereign capacity, and in its sole discretion, to inquire into and contest the same by *quo warranto* or other judicial proceedings. (*Vidal v. Girard's Exrs.*, 2 How. [U. S.] 127, 192; *McConihay v. Wright*, 121 U. S. 201, 215; *Baker Case*, 36 Minn. 185; *Land v. Coffman*, 50 Mo. 243, 254; *Hickey Case*, 32 Fed. Rep. 22;

Statement of case.

Barnes v. Suddard, 117 Ill. 238; *Hayward v. Davidson*, 41 Ind. 213, 215; *Sheewalter v. Panier*, 55 Mo. 219, 233, 234; *Girard v. Philadelphia*, 7 Wall. 1, 14; *Chambers v. St. Louis*, 29 Mo. 543, 576, 577; *Cal. Tel. Co. v. Alta. Tel. Co.*, 22 Cal. 398, 430; *Bybee v. Oregon, etc., R. Co.*, 26 Fed. Rep. 586; *Christian Union v. Yount*, 101 U. S. 353, 361; *Cowell v. Springs Co.*, 100 id. 56, 60; *DeCamp v. Dobbins*, 2 N. J. Eq. 40; *Mallett v. Simpson*, 94 N. C. 37, 41; *Grundie v. Northampton Co.*, 7 Penn. 233; *Hough v. Cook Land Co.*, 73 Ill. 23; *Banks v. Portiauz*, 3 Rand. [Va.] 136; *In re El. R. R. Co.*, 70 N. Y. 327, 338; *People ex rel. Murphy v. Kelly*, 76 id. 476, 487.) The maintenance of a university library is one of the purposes comprehended in the general objects of the charter. (*Mich. U. v. Detroit Y. M. Soc.*, 12 Mich. 161; *Exrs. of McDonough v. Murdock*, 15 How. [U. S.] 367; *Vidal v. Girard's Exrs.*, 2 id. 127; *Perin v. Carey*, 24 id. 465; *Jones v. Habershaw*, 107 id. 175, 189; *Maynard v. Woodward*, 36 Mich. 423, 427.) In the absence of proof it will be presumed that a corporation holds real estate for the purposes permitted, and in pursuance of the powers granted in its charter. (*Farmer's Loan Co. v. Curtis*, 7 N. Y. 466; *Chautauqua Co. Bk. v. Risley*, 19 id. 370, 380-382; *Ex parte Peru Iron Co.*, 7 Cow. 540; *Regents of University v. Detroit Y. M. Soc.*, 12 Mich. 139, 159; *Yates v. Van DeBogert*, 56 N. Y. 526.) Independently of the acts of 1840 and 1841, there being no statutory prohibition against acquiring personal property in any manner, the university could take title by bequest without limit for any of the purposes of its incorporation. (*Sherwood Case*, 4 Abb. App. Dec. 227, 231; *Green's Brice's Ultra Vires*, 10; *Grant on Corp.* 98.) Any corporate contract or proceedings in excess of its power or authority, does not affect the validity of the title or of the act as between the parties. (*Indiana v. Woram*, 6 Hill, 33, 37; *Howell v. Earp*, 21 Hun, 395; *Wilson v. Furness R. Co.*, L. R., 9 Eq. Cas. 34; *Whitney Arms Co. v. Barlow*, 63 N. Y. 63; *Bissell v. Mich., etc., R. Co.*, 22 id. 258, 259; *Parish v. Wheeler*, Id. 494; *Ellsworth v. St Louis, etc., R. Co.*, 98 id.

Statement of case.

553; *At. State Bk. v. Savery*, 82 id. 292, 307; *Rider, etc., Co. v. Roach*, 97 id. 378, 382; *Ayres Case*, L. R., 3 P. C. 548, 558, 559; *Camden, etc., R. R. Co. v. Mays Land-ing, etc., R. Co.*, 48 N. J. Law, 530; 2 Morawetz on Corp. §§ 648-660 *et seq*; *Lent v. Howard*, 89 N. Y. 169, 177.) As the title therefore vested in the university under the will, the state could waive its sovereign right of escheat for a violation of the charter in holding more than the legal limitation, and could extend or remove the limitation and confirm the corporate title. (*State v. Turnpike Company*, 15 N. H. 162; Laws of 1882, chap. 133, § 2; *Wadsworth's Case*, 12 N. Y. 379; *In re Trustees of P. E. School*, 31 id. 575, 588, 589; *Vidal v. Girard's Exrs.*, 2 How. [U. S.] 191.) At common law the real estate of a corporation reverted to the grantors, or their heirs, in case of a dissolution. (1 Black. Com. 484; Coke's Inst. 13 b; *Atty.-Gen. v. Gower*, 9 Mod. 226; Grant on Corp. 301, 303, 304; 2 Morawetz, § 1031; *Yates v. Van De Bogert*, 56 N. Y. 526; *Nicoll Case*, 12 id. 121; *People v. Moran*, 5 Denio, 389; *Vail Case*, 106 N. Y. 283, 287; *Paige v. Heineburg*, 40 Vt. 81; *Heath v. Barmore*, 50 N. Y. 302; 1 R. S. 600, §§ 9, 10; *Owen v. Smith*, 31 Barb. 407; *Tower v. Hale*, 46 id. 361; *Kenny v. Wallace*, 24 Hun, 479; *Sweet Case*, 79 N. Y. 293; *Heywood Case*, 7 id. 217; *Armstrong Case*, 45 id. 234; *Rexford v. Knight*, 11 id. 308; *Beal Case*, 41 Hun, 173; *Tower v. Hale*, 46 Barb. 361; *Sanderson v. White*, 18 Pick, 328.) The word "hold" is used in the charter in the sense of "own." (1 Abb. Law Dict. 565; *Godfrey v. Godfrey*, 17 Ind. 6-9.) The United States is a body politic and corporate, and as such is capable of contracting. (*U. S. v. Maurice*, 2 Brock. 96, 109, 110; *U. S. v. Tingey*, 5 Pet. 114; *U. S. v. Bradley*, 10 id. 343; *U. S. v. Hodson*, 10 Wall. 395, 407; *U. S. v. Linn*, 15 Pet. 290, 311.) The same principle applies to the state. (*Dan-olds v. State*, 89 N. Y. 37, 44; *People v. Stephens*, 71 id. 527.) The grant by the United States to the state upon conditions, and the acceptance of the grant by the state constituted a contract. (*McGee v. Mathis*, 4 Wall. 143, 155; *Chicago*,

Statement of case.

etc., *R. R. Co. v. Auditor General*, 53 Mich. 79, 91.) The contract, being valid, created a trust, setting apart a permanent fund for educational purposes. (*Barrings v. Dabney*, 19 Wall. 1, 9; *Swan v. Lindsey*, 70 Ala. 520; *Comrs. of Sinking Fund v. Walker*, 7 Miss. 143, 184; 1 Perry on Trusts, §§ 28, 30, 40, 41, 287; *Equitable Trust v. Fisher*, 106 Ill. 189; *U. S. v. Hall*, 98 U. S. 357, 358; *Exrs. McDonough v. Murdoch*, 15 How. [U. S.] 367, 415; *Milford v. Reynolds*, 1 Phila. 185, 194.) The trust in this case is not subject to the laws for the regulation of trusts in this state. (*Odell v. Odell*, 10 Allen, 1; *Exrs. of McDonough v. Murdoch*, 15 How. [U. S.] 367; *Perin v. Carey*, 24 id. 466; *Vidal v. Girard's Exrs.*, 2 id. 127; *Magdalen College v. Attorney-General*, 6 H. of L. Cas. 189; *Philpot v. St. George's Hospital*, 6 id. 338.) The courts will regulate and control such a special trust, whether the fund is derived from individuals, the crown, the state or the nation, and enforce its provisions according to law. (2 Perry on Trusts, § 707; *Barnum v. Baltimore*, 62 Md. 277, 298, 299; *People v. Canal Board*, 55 N. Y. 390; 2 Dillon's Mun. Corp. §§ 567, 909.) The legal title to the trust property vested, under the grant, in the state, as trustee, for the particular purposes specified. (*Shulenburg v. Harriman*, 21 Wall. 44, 60, 62; *Leavenworth, etc., R. Co. v. U. S.*, 92 U. S. 733, 741; *M., etc., R. R. Co. v. K., etc., R. R. Co.*, 97 id. 491, 496, 497; *R. R. Co. v. Baldwin*, 103 id. 426, 429; *Wood v. R. R. Co.*, 104 id. 329, 332; *Van Wyck v. Knevals*, 106 id. 360, 365; *Rutherford v. Greene*, 2 Wheat. 196; *St. P., etc., R. R. Co. v. Greenhalgh*, 26 Fed. Rep. 563; *Wright v. Rosebury*, 121 U. S. 488; *Donovan v. Van De Morle*, 78 N. Y. 247; *Harris v. A Bible Soc.*, 2 Abb. Ct. App., Dec. 320; *Brewster v. Striker*, 2 N. Y. 19, 31; *Hathaway v. Hathaway*, 37 Hun, 265; *Leggett v. Leggett*, 2 N. Y. 297, 305; *Adams v. Perry*, 43 id. 487, 497; *Marx v. McGlynn*, 88 id. 375, 376; *Goodrich v. Milwaukee*, 24 Wis. 422, 431; *Devin v. Hendershott*, 32 Iowa, 194; *Neilson v. Logan*, 12 How. [U. S.] 98, 107; *W. R. R. Co. v. Nolan*, 48 N. Y. 513, 517; *Bennett v. Gar-*

Statement of case.

lock, 79 id. 302; *Bramhall v. Ferris*, 14 id. 46; *Eq. Trust Co. v. Fisher*, 106 Ill. 189, 195.) The act of Congress, being the original source and only authority for the existence of the trust, it is also the exclusive warrant for all power to act or right to exercise control over the property. (*Eq. Trust Co. v. Fisher*, 106 Ill. 195; *Barber v. Cary*, 11 N. Y. 397; *Kissam v. Dierkes*, 49 id. 602.) The duties and powers of trustees cannot be delegated to others, unless there is express authority for that purpose given in the instrument creating the trust. (1 Perry on Trusts, §§ 287, 402; *Diefendorf v. Spraker*, 10 N. Y. 246, 250; *Thatcher v. Candee*, 4 Abb. Ct. App. Dec. 387; *Cruger v. Halliday*, 11 Paige, 314, 319; *Brennan v. Wilson*, 71 N. Y. 502, 506.) Nor can the trustee, where the trust is created for a specific purpose, even with the consent of the *cestui que trust*, divert the property from the appointed purpose. (1 Perry on Trusts, § 386, note a; *Dunham v. Milhaus*, 70 Ala. 596; *Loving v. Brodie*, 134 Mass. 453, 459; *Isham v. Del., etc., R. R. Co.*, 11 N. J. Eq. 227; *Lee v. Horton*, 104 N. Y. 541, 542; *Wetmore v. Porter*, 92 id. 77; *Story v. N. Y. El. R. Co.*, 90 id. 124, 157; *Watertown v. Cowen*, 4 Paige, 510; *Hunter v. Sandy Hill*, 6 Hill, 407, 412; *Adams v. S., etc., R. R. Co.*, 11 Barb. 414, 450; *Barclay v. Howell*, 6 Peters, 498; *Warren v. Lyons*, 22 Iowa, 351; *Hellman v. McWilliams*, 70 Cal. 449; *Broadway Nat. Bk. v. Adams*, 133 Mass. 170; *Nichols v. Eaton*, 91 U. S. 716; *Hyde v. Woods*, 94 id. 523; *Wetmore v. Truslow*, 51 N. Y. 338; *Locke v. Mabbett*, 3 Abb. Ct. App. Dec. 69.) The courts have no power to destroy or impair a valid trust before the term of its limitation, nor to authorize the fund to be alienated or diverted from its proper purpose or custody. (*Douglas v. Cruger*, 80 N. Y. 15; *Lent v. Howard*, 89 id. 171, 181; *Harvard College v. Society, etc.*, 3 Gray, 280, 301.) And an act of the legislature will be equally ineffectual to accomplish such a result. (*Stone v. Framingham*, 109 Mass. 303; *Shulenburg v. Harriman*, 21 Wall. 59, 64; *Swan v. Lindsey*, 70 Ala. 507, 521; *Barrings v. Dabney*, 19 Wall. 1, 9.) Even the United States as donor cannot revoke the

Statement of case.

trust or resume title to or control of the fund, without the consent of all the parties in interest, except for a forfeiture of conditions in the grant. (1 Perry on Trusts, § 104; *Gilchrist v. Stevenson*, 9 Barb. 9, 15; *Isham v. D., etc., R. R. Co.*, 11 N. J. Eq. 227; *Adams v. S., etc., R. R. Co.*, 11 Barb. 414, 450; *Cincinnati v. White*, 6 Peters, 432; *Van Wyck v. Knevals*, 106 U. S. 360.) Nor can the trustee by any act of his own divest himself of or convey away the legal title to the fund, particularly to persons having knowledge or notice of the trust. (*Gilchrist v. Stevenson*, 9 Barb. 9, 15; *Isham v. D., etc., R. R. Co.*, 11 N. J. Eq. 227; *Reid v. Bank of Mobile*, 70 Ala. 199; *Swan v. Lindsey*, Id. 507, 521; *Lee v. Horton*, 104 N. Y. 451; *Wetmore v. Porter*, 92 id. 77; *Stockton v. Newark*, 42 N. J. Eq. 531; *Pierce v. Weaver*, 65 Tex. 45; *Shulenburg v. Harriman*, 21 Wall. 45, 59; *Farnsworth v. Minn., etc., R. R. Co.*, 92 U. S. 50, 65; *Swan v. Miller*, 82 Ala. 530; *Dow v. Berry*, 18 Fed. Rep. 121; *Smith v. Bowen*, 35 N. Y. 83; *Zimmerman v. Kinkle*, 13 State Rep. 634; 108 N. Y. 282; 1 Perry on Trusts, §§ 38, 334, 346; *Cruger v. Jones*, 18 Barb. 467; *Douglas v. Cruger*, 80 N. Y. 15, 19; *Johnson v. Towsley*, 13 Wall. 72, 85; *Lindsey v. Hawes*, 2 Black, 554, 558; *South Pac., etc., R. R. Co. v. Dull*, 22 Fed. Rep. 490, 498; *Winona, etc., R. R. Co. v. St. Paul, etc., Co.*, 26 Minn. 179, 182; *Cunningham v. Ashley*, 14 How. [U. S.] 338; *White v. Douglas*, 71 Cal. 116.) Considered in the light of these principles, the legal title to and the ownership of the trust fund is still in the state of New York. (*People v. Stephens*, 71 N. Y. 527, 549, 550; *Danold's Case*, 87 id. 37, 44; Laws of 1866, 1060, § 1; *Sage v. Board of Liquidation*, 37 La. Ann. 413, 414.) The subsequent transfer of the property thus acquired by Mr. Cornell, together with all his rights and liabilities under his contracts with the state, with the consent of the state authorities, to the university, does not change the legal aspect of the case. (*Wetmore v. Parker*, 52 N. Y. 451; *Chamberlain Case*, 43 id. 425.) Nor did the act of the legislature of 1880 effect a transfer of the title of the trust property

Statement of case.

to the university, or relieve the latter from its liability for the purchase-price of the scrip. (*Leavenworth, Gal., etc., R. R. Co. v. U. S.*, 92 U. S. 733, 740; *D., etc., R. R. Co. v. Litchfield*, 23 How. [U. S.] 66, 88; *Charles R. Bridge v. Warren Bridge*, 11 Pet. 421, 545; *Sidell v. Granjean*, 111 U. S. 413, 437, 438; *Rice v. R. R. Co.*, 1 Black, 359, 374; *Patterson v. Winn*, 11 Wheat. 380, 384; *Polk v. Wendell*, 9 Cranch, 87, 101; 5 Wheat. 293, 303; *Jackson v. Lawton*, 10 Johns. 23.) Congress could not repeal the act of 1862, so as to divest the interest of the state, without its consent. (*Terrett v. Taylor*, 9 Cranch, 43, 50; *Powlet v. Clark*, 9 id. 292, 332, 336; *Vincennes University v. Indiana*, 14 How. [U. S.] 269, 274; *Home of Friendless v. Rouse*, 8 Wall. 431, 436, 440; *Farrington v. Tennessee*, 95 U. S. 679, 683; *Wood v. Burnham*, 6 Paige, 518; affirmed, 26 Wend. 19; 1 Perry on Trusts, § 359; *Fletcher v. Peck*, 6 Cranch, 87, 135; *Curran v. Arkansas*, 15 How. [U. S.] 304; *Van Hoffman v. Quincy*, 4 Wall. 535; *Barrings v. Dabney*, 19 id. 1, 10.) The most beneficial clause in the charter conferring the right to the income from the trust fund cannot, therefore, be repealed or altered without the concurrence of the university. (*Assessors v. Morris, etc., R. R. Co.*, 49 N. J. Law, 193; *Dartmouth College v. Woodward*, 4 Wheat. 518; *Woodruff v. Trapnall*, 10 How. [U. S.] 190; *Curran v. Arkansas*, 15 id. 304; *State Bank v. Knoop*, 16 id. 369; *Dodge v. Woolsey*, 18 id. 331; *Jefferson Bank v. Skelly*, 1 Black, 436; *Vincennes University v. Indiana*, 14 How. [U. S.] 269; *McGee v. Mathis*, 4 Wall. 143; *Home of Friendless v. Rouse*, 8 id. 431; *Wash. University v. Rouse*, 8 id. 440; *Barrings v. Dabney*, 19 id. 1, 9, 10; *Farrington v. Tennessee*, 95 U. S. 683; *Canal, etc., Co. v. Tedesco*, 37 La. Ann. 100.) It is apparent, from the charter of the university, read in connection with the act of congress, that no part of the National Trust Fund was reckoned or included as a part of the \$3,000,000, to which its capacity to hold property was restrained and limited. (Laws of 1865, chap. 585, § 6; *Brick v. Gannon*, 36 Hun, 52; *People v. Wood*, 71 N. Y. 371; *Jones v. Sheldon*, 50 id. 477; *Ingham*

Statement of case.

v. *Dudley*, 60 Iowa, 16, 23; *Angell on Corp.* § 145; *North Hempstead v. Hempstead*, 2 Wend. 109; *Gospel Soc. v. Powlet*, 4 Pet. 480.)

Esek Cowen and *George F. Comstock* for respondents. Neither the husband nor the heirs-at-law of Mrs. Fiske were precluded from raising the question that the devises to the Cornell University were void or ineffectual by the fact that they had accepted their legacies under the will. Their acts created nothing in the nature of an estoppel. (*Hawley v. James*, 16 Wend. 142; *Noyes v. Mordaunt*, 2 Vern. 581; *Blake v. Banbury*, 1 Ves. 523; *Downing v. Marshall*, 23 N. Y. 366.) If, at the date of the death of Jennie McGraw Fiske, on the 30th of September, 1881, Cornell University was possessed of property to the amount of \$3,000,000 or more, it was incapable of receiving the attempted devise in her will, the title to the property did not vest in the university, and it descended to her heirs-at-law and next of kin, as in case of intestacy. (*Chamberlain v. Chamberlain*, 43 N. Y. 424; *Leazure v. Hillegas*, 7 S. & R. 313; *Baird v. Bk. of Washington*, 11 id. 411; *Runyan v. Coster*, 14 Pet. 122; *Bank v. Matthews*, 98 U. S. 62, 621; *Bank v. Whitney*, 103 id. 99; *Fortier v. N. O. Bk.*, 112 id. 240; *Bissell v. R. R. Co.*, 22 N. Y. 260; *Parish v. Wheeler*, Id. 494; *Whitney Arms Co. v. Barlow*, 63 id. 62; *Bk. of Mich. v. Niles*, 1 Doug. [Mich.] 401; *P. R. R. Co. v. Seeley*, 45 Mo. 212; *Crispell v. Dubois*, 4 Barb. 397; *Lynes v. Townsend*, 33 N. Y. 561; *McCarty v. Orphan Asylum*, 9 Cow. 437; *Baker v. Clark Institute*, 110 Mass. 88; *White v. Howard*, 45 N. Y. 144; *Goddard v. Pomeroy*, 36 Barb. 546; *Leslie v. Marshall*, 31 id. 561; *Ayres v. M. E. Church*, 2 Sand. Sup. Ct. 351.) The land grant from the United States, appropriated to Cornell University by its charter, in consideration of a payment of \$525,000 by Ezra Cornell, is to be reckoned as part of the \$3,000,000 which the university was permitted by its charter to hold. (*Bogardus v. Trinity Church*, 4 Sandf. Ch. 642.) The land grant fund, now in the hands of the state for the

Statement of case.

purpose of investment, the whole income of which belongs exclusively to Cornell University, within the meaning of the fifth section of its charter, and is to be included in the \$3,000,000, to which amount the right of the corporation to hold real or personal property is thereby limited. (*Steif v. Hart*, 1 N. Y. 20; 2 R. S. chap. 2, §§ 22, 28; *People v. Mayor of Brooklyn*, 9 Barb. 564; *Hollis v. Drew Theological Sem.*, 95 N. Y. 166.) The gift or grant of the income or produce of personal property, in perpetuity or without any limitation in favor of others, is a gift or grant of the *corpus* of the fund, which produces the income and vests the income of the fund in the donee or grantee. (*Mason's Exrs. v. Trustees of M. E. Church*, 27 N. J. Eq. 47; *Haig v. Swiney*, 1 S. & S. 489; *Adamson v. Armitage*, 19 Ves. 418; *Page v. Leapingwill*, 14 id. 463; *Gulick v. Gulick*, 27 N. J. Eq. 498; *McMichael v. Hunt*, 83 N. C. 344; *Fox v. Carr*, 16 Hun, 566.) When the state, for a valuable consideration parted with by Ezra Cornell, granted to Cornell University the sole and exclusive right to receive the income and avails of this fund forever, it granted to the university not only the income, but the absolute property in the fund, subject only to the duty of the state, to invest it, collect the income and proceeds and pay them over to the university. (*Morrison v. Semple*, 6 Bin. 94; *Jackson v. Hounsel*, 17 Johns. 283; *Lawrence v. Lawrence*, 1 Edw. 258; *Baird v. Bk. of Wash.*, 11 S. & R. 411; *Coleman v. R. R. Co.*, 49 Cal. 517; *Hill on Trustees*, 52, 53; *Perry on Trusts*, §§ 63-65.) There is nothing in the act of congress creating the land grant fund, which by express provision or necessary implication makes the several states, to which it was given, the perpetual custodians of the fund, and the state of New York had the legal right to vest the title to the whole or any part of such fund, in any corporation which it might designate as the beneficiary thereof, coming within the description of the act of congress. (*Perry on Trusts*, §§ 297, 920; *Inches v. Hill*, 106 Mass. 575; *Smith v. Harrington*, 4 Allen, 566; *Bowditch v. Andrew*, 8 id. 339; *Taylor v.*

Statement of case.

Huber, 13 Ohio St. 288; *Short v. Wilson*, 13 Johns. 33; *Passingham v. Sherborne*, 9 Beav. 424; *Reid v. Reid*, 30 id. 388; *Ex parte Chitton*, 21 Eng. L. & Eq. 186; *R. R. D. Church v. Mott*, 7 Paige, 80.) The state had a right to terminate its trust and transfer the fund to the only party which had a beneficial interest in it, and the validity of the transfer was not affected by any illegal and ineffectual consent on the part of the state, that the university might use the income for a purpose not contemplated by congress. (*Perry on Trusts*, 849, 851; *Hill on Trustees*, 525, 526, 579; *Fyler v. Fyler*, 3 Beav. 560; *Walker v. Symond*, 3 Swan., 64.) A conveyance in breach of the trust, to a stranger, not being void, a *fortiori* it is not void, when made directly to the *cestui que trust*. At the most it would only be voidable at the suit of a proper party. (*Perry on Trusts*, §§ 334, 336, 849.) The only other remedy against a breach of trust, in this class of cases, is at the suit of the attorney-general of the state, or of the United States. (*Perry on Trusts*, § 744.) No court of equity can intervene and compel the state to assume control of this Cornell endowment fund, so that the transfer to the trustees of the university, not being void, and no court or other power existing can avoid it, the legal title like the equitable interest, is perpetually vested in the university. (*Atty.-Gen. v. Fishmongers' Co.*, 5 Myl. & Cr. 16; *Atty.-Gen. v. Smithies*, 2 R. & M. 749; *People v. Stephens*, 71 N. Y. 536.) The assignee of the state being permitted to locate the lands, the assignment of the scrip by the state was equivalent to a grant of the lands by congress to the assignee and vested in him the legal title to the lands to be thereafter located. (*Swan v. Lindsay*, 70 Ala. 521.) The title of a corporation to all its principal, is, in one sense defeasible, that is, its title may be defeated by the expiration or destruction of its charter. But it does not take a defeasible title to the specific land which its charter forbids it to hold. It either takes no title or it takes a title as absolute as a corporation can take with regard to any property, namely, a title that continues during its own existence. If its charter is annulled, even then the land does not go to the state, but

Opinion of the Court, per PECKHAM, J.

reverts to its original owners. (*Nicoll v. N. Y. & E. R. R. Co.*, 12 N. Y. 121.) The courts of this state will not make themselves *particeps criminis* with the corporation in a violation of the law of the land, for which the corporation can be punished by the annulment of its charter. (*De Camp v. Dobbin*, 31 N. J. Eq. 671.)

PECKHAM, J. The question to be decided in this case is whether Cornell University or some other parties, being the residuary legatees, or else the heirs-at-law or next of kin of John McGraw, deceased, or of Jennie McGraw Fiske, deceased, or her husband, shall have the property, or any portion of it, bequeathed to the university by the will of Mrs. Fiske. In case the university should be held not to be a competent legatee, the question as to where the property shall go is, as we understand, a matter in which the various parties to the litigation have agreed, and hence the only question we need consider is, first, in regard to the capacity of the corporation to take the legacy. If that should be decided in the affirmative, it would be necessary to discuss no other question. If, however, it should be held that the corporation had no power to take and hold more than \$3,000,000, the second question would be as to whether it was the owner and holder of such an amount at the time of the decease of Mrs. Fiske. Both of these questions are important and worthy of the most careful and deliberate consideration. The case involves a very large amount of property, and involves, also, the decision of a question as to the effect of the general statutes relating to the acquisition and holding of property by corporations of the class of this university, as the same have been affected by the terms of the special charter granted to it.

The case has been most elaborately and ably argued by counsel on both sides, and the written briefs submitted to the court by them bear conclusive evidence of the thoroughness and extent of their researches into the English law on the subject of mortmain and its results, as well as that of our own and of the other states of the union.

Opinion of the Court, per PECKHAM, J.

To examine and comment upon each argument advanced, and to go through the long list of cases cited in this and other states and in England, would render this opinion of immoderate length and would not probably be of any great service. We must be content to give the conclusion at which we have arrived, together with the reasons which seem to us controlling, in as short a space as it reasonably may be done.

First. Coming to a discussion of the first question, it may be assumed that a corporation, by the common law, had power to take property by devise. (*Sherwood v. American Bible Society*, 4 Abb. Ct. of App. Dec. 227, 231; 1 Kyd on Corp. 74-78; Grant on Corp. 98.)

Our Revised Statutes provided that every corporation, as such has power, among other things (§ 1, subd. 4), to hold, purchase and convey such real and personal estate as the purposes of the corporation shall require, not exceeding the amount limited in its charter. By section 2 of the same title of the statutes the powers enumerated in section 1 "shall vest "in every corporation that shall hereafter be created, although "they may not be specified in its charter or in the act under "which it shall be incorporated."

Section 3 provides that, in addition to the powers enumerated in the first section, and to those expressly given in its charter or in the act under which it is or shall be incorporated, no corporation shall possess or exercise any corporate powers, except such as shall be necessary to the exercise of the powers so enumerated and given. (1 R. S. 599-600, §§ 1, 2. 3.)

Under this power to hold, purchase and convey such real and personal estate as the purposes of the corporation may require, not exceeding the amount limited in its charter, the corporation could take property by devise, for the word purchase includes all means of acquiring property not coming to one by descent or the mere act or operation of the law. The same Revised Statutes, however, in providing for the transmission of real property by will, stated that "every estate "and interest in real property descendible to heirs," might be devised. "Such devise may be made to every person capable

Opinion of the Court, per PECKHAM, J.

“by law of holding real estate; but no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter or by statute to take by devise.” (2 R. S. 57, §§ 1, 2, 3.)

There are other provisions in the Revised Statutes relating to corporations incorporated for purposes of education. It is enacted therein that, “the trustees of every college to which a charter shall be granted by the state shall be a corporation.” (Sec. 31.)

“SEC. 36. The trustees of every such college, besides the general powers and privileges of a corporation, shall have power

* * * * *

“4. To take and hold, by gift, grant or devise, any real or personal property, the yearly income or revenue of which shall not exceed the value of twenty-five thousand dollars.” (1 R. S. 460, §§ 31-37.)

At the adoption of the Revised Statutes, therefore, the law in this state was that a corporation could hold, purchase and convey such real and personal estate as the purposes of the corporation should require, not exceeding the amount limited in its charter, but it could not take any real property by devise unless it was expressly authorized by its charter or by statute to take by devise. And there was power in the trustees of a college to which a charter was granted by the state, to take and hold real or personal property by gift or devise, provided the income did not exceed \$25,000 annually. Some time subsequent to the adoption of these statutes, and in the years 1840 and 1841 (chap. 318 of 1840 and chap. 261 of 1841), the legislature passed acts (the latter being an amendment of the earlier one) by which trusts were authorized to be created by grants, devises, and bequests of property to incorporated colleges or other literary incorporated institutions in the state, to be held in trust for specific purposes comprehended in the general objects authorized by their charters. The acts contained no

Opinion of the Court, per PECKHAM, J.

limitation as to the amount or value of property which could be thus taken in trust by the corporation.

It was held, however, by this court in *Chamberlain v. Chamberlain* (43 N. Y. 424) that these acts did not repeal or affect the general law of the state limiting and restricting the amount and value of property which could be taken and held by literary and educational corporations, and it was therein said that the general laws of the state are in harmony with its policy, which has been uniform and consistent, so far as such policy is indicated by legislation in relation to gifts in mortmain, and the powers of corporations to take and hold property. It was further said that these statutes (those of 1840-1841) authorized the creation of special trusts, in furtherance of the objects of the corporations named, but that such trusts could be created and full effect given to the acts within the limits imposed by the general laws upon the power of the corporations to acquire and hold property. There being no express repeal of the general provisions of law or repudiation of the uniform policy of the state, the intent of the legislature to do either, it was said, could not be implied.

Thus the several provisions of law relating to the property of corporations stood at the time of the granting of its charter to Cornell University by the state in 1865. By chapter 585 of the Laws of that year, the legislature incorporated and established the Cornell University. In the first section of the act the following language is to be found: The corporation hereby created shall have the rights and privileges necessary to the object of its creation as declared in this act, and in the performance of its duties shall be subject to the provisions and may exercise the powers enumerated and set forth in the second article of the fifteenth chapter, title 1 of the Revised Statutes of the State of New York.

The second article above alluded to is entitled "of the powers and duties of the trustees of colleges," and is to be found already referred to (*supra*) as 1 Revised Statutes, 460, sections 31 to 37. It is subdivision 4 of section 36 which authorizes the trustees to take and hold real or personal

property by gift or devise not exceeding the value therein stated.

Section five of the charter reads as follows :

"SEC. 5. The corporation hereby created may hold real and personal property not exceeding three millions of dollars in the aggregate."

These provisions in the charter, together with the statutes above alluded to, must be examined for the purpose of discovering, if possible, what was the legislative intent towards this corporation regarding property.

The learned counsel for the appellant claims at the threshold, that the provisions of the Revised Statutes as to the incorporation of colleges (*supra*), with a single exception, were merely intended to apply to institutions of learning incorporated by the regents of the university of the state under the general laws of the state. He argues that the regents had power to incorporate a college by virtue of the provisions of the act (Chap. 82) of 1787, the provisions of which were re-enacted in 1813 and incorporated subsequently into the Revised Statutes, and at that time, and for many years thereafter, there was no other way of incorporating a college unless by a special act of the legislature. Hence, he says these provisions of law, general in their nature applied to corporations which were incorporated by the regents, and were never supposed to apply to corporations incorporated by special act, unless expressly made applicable in the special act.

The counsel is right in his statement as to the fact when the act was passed. At that time there was no general law for the incorporation of colleges or other institutions of learning, other than by the regents, and when they granted a charter there can be no doubt that its provisions were affected by the act as contained in the Revised Statutes. But the language therein used (sec. 31), that the trustees of every college to which a charter shall be granted by the state shall be a corporation, is general in its nature, and it would seem to include all cases embraced within its language. That it is superfluous to apply it to the case of a corporation which becomes such by virtue

Opinion of the Court, per PECKHAM, J.

of the very act which incorporates it, is not a conclusive answer. It is an argument from the point of view that it was unnecessary, but because it was unnecessary is not always, perhaps even generally, an argument against the applicability of a statute to a certain condition of things. It is alike unnecessary with regard to colleges or academies which were incorporated by the regents under the power granted them in the acts of 1787 and 1813, both of which acts expressly granted them power to incorporate colleges and academies by giving them a charter. When they did so the college or academy became a corporation by virtue of those acts which empowered the regents to incorporate it. The section (31) was, therefore, unnecessary in both cases, and yet it was adopted, and in its language it embraces all colleges to which a charter is granted by the state.

The thirty-sixth section provides that the trustees of every such college shall have power, among other things (subd. 4), "To take and hold * * * any real and personal * * * property, the yearly income," etc.

I think it plain, therefore, that the provisions contained in that title would be applicable to the Cornell University, although specially chartered by the state, unless inconsistent provisions were to be found therein. The charter, however, in so many words, makes this title applicable to the university. (See section 1 of the charter, part of the language of which is quoted *supra*.)

It is true that it states the corporation, *in the performance of its duties*, shall be subject to the provisions and may exercise the powers enumerated in the title mentioned, among which is the right to take and hold real and personal property. But the title itself is headed, "Of the powers and duties of the trustees of colleges," and among those powers and duties is the right above mentioned. I do not think that the use of the words "in the performance of its duties," would in any wise exclude the application of this fourth subdivision of section 36, and we must look elsewhere for such exclusion if it is to be excluded. That it is to be excluded all admit, but the

Opinion of the Court, per PECKHAM, J.

exclusion is founded upon a special provision in the charter itself which is wholly inconsistent with its continued applicability. The subdivision confines the taking and holding, by gift, etc., of real or personal property to a yearly income not exceeding in value \$25,000, while the charter permits it to hold real and personal property to an amount not exceeding \$3,000,000 in the aggregate.

Both sides admit that this subdivision in question is not applicable — the respondents, because an inconsistent provision in the charter expunges it, while the appellant claims that even if there were no inconsistent provision in the charter, it would still be inapplicable because the statute only applies to corporations incorporated by the regents. The provisions of the charter are inconsistent, and still we must look at all the other statutes above cited for the purpose of discovering what the legislative intent is. Looking at the general statutes we find corporations have power to purchase and hold property necessary for the purposes of their incorporation, not exceeding the amount limited in their charter, but they cannot take by devise unless expressly authorized by their charter or by statute so to take. Then the Revised Statutes prohibit corporations from possessing or exercising any corporate powers, except such as are enumerated or are expressly given to them by their charters, or such as shall be necessary to the exercise of the powers so enumerated and given. The statutes also allow the trustees of a college to take property by gift or devise not exceeding a certain annual income, and then come the acts of 1840–1841, and then the charter of this university. The argument of the learned counsel for the appellant is, as I have said, based upon the theory of the utter inapplicability of the act of the Revised Statutes as to colleges; and then he claims that the acts of 1840 and 1841 bestow a capacity to *take* property by will not exceeding the amount limited in the charter of the corporation; and he claims also that in this case there is no limitation of the power in the charter of the university to *take* real or personal property to any amount.

Opinion of the Court, per PECKHAM, J.

and the only limitation there is consists of a limitation upon the power of *holding* more than \$3,000,000, in the aggregate. He thus obtains the power to *take* an unlimited amount of property by virtue of one act, and a limitation is only placed upon its power to *hold* by another act, and that is the organic act of incorporation itself.

I do not think such an interpretation of the statutes can be sustained. I think the fifth section of the charter gives the measure of the power of the university to take as well as to hold property. The language is an authority as well as a limitation. It is an authority to hold more than the Revised Statutes permitted, but it shall not be permitted to hold more than a certain specified amount. And if there were nothing said on the subject of property in the charter, I think the Revised Statutes as to the limitation for colleges would apply. Reading the language in the charter, it is difficult to imagine a holding without a previous taking of property, and the counsel for the appellant admits that if there were no other statute providing for a taking of property, the language of the fifth section of the charter would necessarily imply a right to take in order to hold. I do not think that his claim to derive an unlimited capacity to take by virtue of the Laws of 1840 and 1841, when construed with the other statutes and with the provisions in the charter, can be upheld as a fair exposition of the legislative intent upon the subject. The statutes of 1840 and 1841 were passed for the purpose of authorizing the creation of certain special trusts in connection with these educational institutions, which could not have been legally created prior to their passage, and their object did not in the least infringe upon the general laws of the state or its policy. As has been said, their passage did not repeal those general laws limiting the amount or value of property which corporations might take and hold. Because a special statute contained provisions upon the subject of the property of the corporation thereby incorporated, which were inconsistent with the general provisions contained in the Revised Statutes relating to the same subject, I do not think the effect was not

Opinion of the Court, per PECKHAM, J.

only to render the general law inapplicable, but also to twist the provisions of the law of 1841 in relation to the special trusts spoken of into a permission outside of and beyond the language of the charter to take property without any limitation as to amount or value. That might have been the effect if the charter had repealed those general provisions as to this corporation, and had made no other provision regarding it. Under such circumstances, the act of 1841 could have been referred to as permitting the corporation to take property by devise and in trust to an extent unlimited, but when the same language which renders the general law inapplicable also gives a power to hold property to a certain limited extent, it seems to me that such a power includes the power to take up to that sum, and limits it accordingly.

It is said that if the power to take an unlimited amount of property and to hold but a certain sum were contained in the same law, there could be no doubt upon the question of the power to take. That may be so, for in that case the legislative will would have been announced in terms which could not be misunderstood. But there is a great difference between the two cases. The question is always one of legislative intent, and the inquiry is whether the statute of 1841, providing for the creation of trusts, really applies in this instance to this university so far as an unlimited capacity to take property is concerned. For the reasons already stated, I think it does not.

Looking for a moment outside of and beyond the statute laws of the state, and in order to strengthen his position regarding the true construction to be given that law as to the material distinction in the case at least of a corporation, between the power to take and the power to hold property, the counsel for the appellant has made a most able and learned argument. Its outlines are, in substance, as follows: A corporation at common law could take and hold property by devise. At an early stage in the history of the law of England, relating to the power of corporations to hold real property, and while the feudal system still prevailed, it was

Opinion of the Court, per PECKHAM, J.

enacted that no man should alien his feud to a corporation under penalty of a forfeiture thereof to his next superior, of whom he held the land, and in default of such superior insisting upon the forfeiture, then his superior might do so, and thus on until the king, as the general superior and lord of all, was reached. But in case the forfeiture was not insisted upon, the corporation, which had taken a defeasible title to the land, could hold it as against all the world.

He therefore insists that this distinction between taking and holding strengthens his claim that the use of the word *hold* in the charter was intentional and for the specific purpose of permitting the corporation to *take* an unlimited amount of property and to *hold* only the amount specified. No sound reason for giving such unlimited power to *take*, while limiting the power to *hold*, can, as it seems to me, be stated. And if such were the intent, I think it would have been plainly stated in the charter instead of trusting to such a conjectural application to be given to another statute.

The counsel cites about all the writers upon the subject of corporations, and they have all adverted to this distinction, as existing in relation to the English corporations subject to the mortmain statutes, and they state that licenses to hold in mortmain were granted to such bodies, but without such licenses they took the title to the real property aliened, subject only to the right of the superior lord to enter and take the land under the power of forfeiture. The only penalty, therefore, which a corporation risked when it took lands without a license in mortmain was that of a forfeiture of the land to the next superior of the grantor, and so on up to the king; and the counsel claims that in this state, in the case of a corporation with unlimited power to take, but not to hold more than a certain amount, the penalty for holding more is that the state, representing the whole people and standing in this respect in lieu of the king (there being no mesne lords), can forfeit the charter of the corporation and thus prevent the further holding. And assuming this to be the fact, he uses it as strengthening his

Opinion of the Court, per PECKHAM, J.

argument as to the existence of this clear and material distinction between taking and holding property.

The further claim is then made that, as title to the property has vested in the corporation, which, in holding it, has become subject to the forfeiture of its charter, the heirs or next of kin of the testator have no more right to raise the question than any other third parties who have no interest therein. It is said that it is a matter for the state alone to take cognizance of, and until it does the corporation holds the property, however much it may transcend the limitation prescribed in its charter.

The counsel states accurately the law of mortmain in England and its consequences of possible forfeiture of the estate granted, and, until forfeiture, the vesting of the title in the corporation indefeasible, except by the re-entry of the person entitled to take it by reason of the forfeiture. But the circumstances under which lands are held by citizens of New York, where their tenure is so wholly different from that which prevailed in England when the early mortmain acts were enacted, render any argument in regard to those acts and their effect totally inapplicable to the case of a corporation of this state. Taking the law as it exists in our statutes, including the special provision upon the subject in the charter of the university, it seems to me that the provision therein, limiting the holding of property, is, as I have said, a restriction also upon the power to take in excess of the specified amount. As, at common law, a corporation could take real property in the same way as an individual, the consequence was that, in England, large landed possessions were held by religious corporations, and, by reason of alienations of real estate to them, the services due by the vassal to the lord were partially, if not totally, paralyzed, and the chief lords lost their escheats. This was a constantly growing and alarming evil. To remedy the difficulty, the first mortmain act was placed in Magna Charta, which declared all such alienations to corporations entirely void, and that the lands should revert to the lord of the fee. It was held, however, that the reversion must

Opinion of the Court, per PECKHAM, J.

be accomplished by *an entry*, and then and from that time there, was a forfeiture, the corporation having taken the title and held the property until such forfeiture by re-entry. (Shelford on Mortmain, 8, 34; 1 Kyd on Corp. 81; Grant on Corp. 106.)

Other statutes upon the subject were subsequently enacted, all for the purpose of preventing the great accumulation of real property in the hands of corporations, and they all provided substantially for a re-entry on the part of the next superior lord whenever lands had been aliened in mortmain, and, until such entry enforcing the forfeiture, the corporation held the lands. There was one law, directed against superstitious uses (23 Henry VIII, Chap. 10); which provided that the grant to such uses for more than twenty years was absolutely void, and the estates thus aliened would have gone to the grantor or his heirs, excepting for a provision, subsequently made, giving such estates to the king. (Wilmot's Opinions, 9, 10, in *Attorney-General v. Downing*, variously reported: Ambler, 550-571; 1 Dick. 414; 3 Ves. Jr. 714; 5 id. 300; 8 id. 256.) The mortmain statute (9 George II, Chap. 36) renders all *devises* to charitable uses void. (Shelford on Mortmain, 118-120.)

The nature of the tenure of real property at the time of the passage of the early mortmain acts in England bears no resemblance to the tenure by which a citizen of this State holds lands. Here there is no vassal and superior, but the title is absolute in the owner, and subject only to the liability to escheat. (Const. of N. Y., art. 1, § 13.) The escheat takes place when the title to lands fails through defect of heirs. (Const. of N. Y., art. 1, § 11.)

A devise to a corporation which is forbidden to take (or forbidden to *hold, if the word*, under the circumstances of the case, is construed to include a taking also) does not, therefore, give a title subject to the right of some superior to claim a forfeiture of the land; but if it be in violation of a statute, I think the devise is void and the land descends to the heir or residuary devisee.

Opinion of the Court, per PECKHAM, J.

We have not in this state re-enacted the statutes of mortmain or generally assumed them to be in force, and the only legal check to the acquisition of lands by corporations consists in those special restrictions contained in the acts by which they are incorporated, and which usually confine the capacity to purchase real estate to specified and necessary objects. (2 Kent's Com. 282.) Of course, the restrictions contained in any general law, if applicable, must also be referred to.

There is, by reference to our laws, no such necessary and universal distinction between taking and holding property by corporations, as is seen in the laws of England relating to alienations in mortmain. Whether the legislature, when using language providing for a limitation upon holding property, meant to permit an unlimited taking, is a question of legislative intent; and I think the general inference would be, in the absence of some plain and controlling circumstance to the contrary, that the legislative body meant to limit a taking as well as a holding beyond the specified amount. As is said in the *Chamberlain Case*, this is in accordance with the policy of the state, a policy which has been recognized as existing for many years, and which the courts have concurred in approving and carrying out. I do not think the statute (Laws of 1779, chap. 25, § 13) touches this case. It provided that the absolute property of all lands, etc., and all rents, franchises, debts, dues, duties and services, escheats and forfeitures, which before the 9th of July, 1776, vested in or belonged or were due to the crown of Great Britain, were and forever after the 9th day of July, 1776, shall be vested in the People of the state, in whom the sovereignty and seigniori thereof are and were united and vested. ✓

The counsel for the appellant does not claim that this property was itself forfeited to the state, if the state should choose to enforce the forfeiture. His claim is, as I understand it, that if the university exceeded its limitation by holding more property than it was allowed by law to hold, a cause of forfeiture of the charter was thereby created, and that in enforcing such forfeiture, after the payment of the debts of

Opinion of the Court, per PECKHAM, J.

the corporation the rest of the property would (as he insists) probably go to the state because there would be no living claimant to it who would have any right to acquire it. A forfeiture the state may claim and may enforce at pleasure when the occasion arises, but it is a forfeiture of the charter and not a forfeiture of the property held by the corporation. It is further claimed that this distinction between the right to take and the power to hold property is one which has been admitted and enforced in the courts of England, of this state and of the other states of the union for a long number of years; and that there is no reason why effect to such a distinction should not be given in this case, the result being, as is stated, that the corporation has an unlimited right to take property and also an unlimited right to hold it as against any one but the state in its capacity of sovereign. There is undoubtedly a distinction between the right to take and the power to hold property under some circumstances, the only question being whether the legislature had such distinction in mind and meant to provide for it in the case in hand. It is said that an alien has the right to take property by purchase, but he cannot hold it as against the state. That is so. He takes, however, a defeasible title, good as to all but the sovereign power, which must take it upon office found or by escheat. (*Wright v. Saddler*, 20 N. Y. 320.)

In such case it is not exactly an accurate description of the alien's title to simply say that he can take but cannot hold. That is a contradiction in terms. If he take, he must hold, if for but a fractional part of a second of time. The expression is but a short one for the statement that he cannot hold, as against the claim of the state, where properly made and enforced. The same expression is used in the case of a corporation under the mortmain laws, that it can take but not hold, the meaning being that it cannot hold as against the claim for forfeiture when made by the next superior lord of the grantor of the lands. That the words lose all their meaning when wrenched from the circumstances under which

Opinion of the Court, per PECKHAM, J.

they were used, and applied to corporations existing by virtue of the laws of this state, seems to me a plain proposition.

The counsel has, however, with great industry and research, cited a number of cases from our own courts and those in other states, where this distinction, he claims, has been admitted, and in cases, too, where the principles involved were similar to the case at bar (one or two being, he says, precisely like it), and where it has been held that in such cases, although the corporation has violated the law of its being, yet no one but the state could take advantage thereof.

I think that, with the exception of one case, they were all entirely different from this one, and the decisions were based upon a totally different and probably a perfectly unassailable ground.

The principal case, or at least one of the early ones, is that of *Leazure v. Hillegas* (7 S. & R. 313), which arose in Pennsylvania and was decided in 1821. The restriction in the charter of the Bank of North America was that the bank should not purchase and hold property excepting under circumstances therein stated. The directors of the bank accepted from their grantor, William Henry, a conveyance of his land (not within their specified powers) at a fair price, in payment of a debt, *bona fide*, due. The question was whether the corporation could hold and convey a title? TILGHMAN, Ch. J., said: "The restriction is that the bank shall not purchase and hold. Purchasing and holding are very different things, and the consequences of each are very different. To purchase *and* hold might have been thought dangerous, but to purchase, subject to the statutes of mortmain, which authorized the state to appropriate the land to its own use, could be attended with no danger."

The court there held that some portions of the mortmain laws of England were in force in Pennsylvania, to the extent of permitting the state, as the sovereign lord, there being no mesne lords, to enter and claim the forfeiture, and that until the state did so, the title of the corporation was good, and it

Opinion of the Court, per PECKHAM, J.

could convey such a title to its grantee. No such laws have been in force in this state.

Under the modern acceptation of the law regarding corporations, this case could probably be supported on an entirely different ground, viz., that it was an executed contract or conveyance, upon a good consideration, and that the grantor could not be heard to dispute his own grant under the circumstances; and that no one could take advantage of this violation of its charter by the corporation excepting the state, which could proceed to forfeit the charter because thereof. The case is no authority in this state for the proposition that none but the state can interfere, nor is it of any importance upon the question as to how material it is to note the absence of an express limitation in words upon the power to take property under the charter of the university. *Baird v. Bank of Washington* (11 S. & R. 411) is a somewhat similar case, and decided also upon the authority of *Leazure v. Hillegas* (*supra*). *Goundie v. Northampton Water Company* (7 Penn. St. 233), decided in 1847, refers to the *Leazure Case*. It was also a case where the contract was on a good consideration, and the company had the right to contract for the land and pay for it, and a deed for value would vest in it a good title, subject to the right of the state to interfere, etc. The case of *Runyan v. Coster* (14 Pet. [U. S.] 122), decided in 1840, upon appeal from the Circuit Court in Pennsylvania, was decided with express reference to the statute of that state, passed April 6, 1833, relative to escheats, which permitted the corporation to retain the title, subject to be divested at any time by the commonwealth. The decision was put upon the ground of the act of 1833 and the doctrine of the Supreme Court of Pennsylvania in the *Leazure Case*. These are the cases cited from the Pennsylvania courts, and it is plain they furnish no support for the contention in this case, in the absence of those laws of mortmain upon which they were founded.

There is one case, however, which has been decided by the Supreme Court of the United States upon the question of

Opinion of the Court, per PECKHAM, J.

who may take advantage of a violation of the charter in relation to the power to hold property, which comes very near the case at bar. The decision of that court goes quite a distance towards sustaining the contention of the appellant's counsel, although there was another ground upon which the decision could rest. The very great respect which we all feel for any decision of the Federal Court of last resort, and for any opinion given by its learned and able judges, even in cases where it is not binding upon us, renders it necessary to examine the case with some care. The case is *Jones v. Habersham* (107 U. S. 174). The head-note is: "Restrictions imposed by the charter of a corporation upon the amount of property it may hold cannot be taken advantage of collaterally by private persons, but only in a direct proceeding by the state."

The testatrix, a resident of the state of Georgia at the time of her death, devised and bequeathed to the Georgia Historical Society certain land for the purposes of maintaining a historical society, etc. The corporation was incorporated in 1839, and had power to purchase, take, hold, etc., lands and tenements, provided the clear annual income of such real and personal estate should not exceed the sum of \$5,000. It was admitted that the net income of the corporation from property held by it at the time of the death of the testatrix was between \$3,000 and \$4,000, and that the income of the property bequeathed to it by her will would add \$7,000 to that income. The appellants, who were the heirs-at-law and next of kin of the testatrix, claimed that the gift was void *in toto*, as it gave more than the corporation was allowed to take or hold. The court, per GRAY, J., stated the answer to such proposition in the language of the head-note above quoted, and, without argument, referred in support of such doctrine to five cases, viz.: *Runyan v. Coster* (14 Pet. 122, 131); *Smith v. Shelley* (12 Wall. 358, 361); *Bogardus v. Trinity Church* (4 Sand. Ch. 633, 758); *De Camp v. Dobbins* (29 N. J. Eq. 36); *Davis v. Old Colony Railroad Company* (131 Mass. 258, 273).

Opinion of the Court, per PECKHAM, J.

Upon looking at those cases I have been unable to find that they *decide* the principle they are cited to sustain. It seems to me that the question was not really and fully presented, discussed or decided in any of them. The first case, *Runyan v. Coster* (14 Peters, *supra*), has already been cited and sufficiently discussed. It was decided upon the express statute of Pennsylvania, and can be no authority for the general doctrine stated by Mr. Justice GRAY in his opinion. The next case is *Smith v. Shelley* (12 Wall. 358-361). The bank in that case had been incorporated by an act of a territorial legislature, where a law of Congress was in force providing that no act of such a legislature incorporating a bank should have any force until approved by congress. The bank had power under the territorial act "to buy and possess property of every kind." Land was sold to it for a money consideration paid by it.

Mr. Justice DAVIS, in his opinion, said: "It is insisted, "however, as an additional ground of objection to this deed, "that the bank was not a competent grantee to receive title. " * * * It could not legally exercise its powers until the "approval of congress was obtained, but this defect in its "constitution cannot be taken advantage of collaterally. " * * * Conceding the bank to be guilty of usurpation, "it was still a body corporate *de facto* exercising at least one "of the functions which the legislature attempted to confer "upon it, and in such a case the party who makes a sale of "real estate to it is not in a position to question its capacity "to take the title after it has paid the consideration for the "purchase" This, as it seems to me, is also very far from authority for the proposition for which it is cited. The grantor dealt with it as a corporation, received its money, and should not be heard to deny or question its existence.

The next case cited by the learned judge is *Bogardus v. Trinity Church* (4 Sand. Ch. 633; Vice-Chancellor's opinion, 720-758, as to point in question.) It was provided that the church could not hold more than an income of £500. The fact was that when the grant in question was made it did not hold, with the grant, nearly as much as it was allowed. Then the

Opinion of the Court, per PECKHAM, J.

vice-chancellor said, if it did, it was a question between the corporation and the sovereign power, in which individuals have no concern, and of which they cannot avail themselves in any mode against the corporation. This was mere *obiter*. The question was not involved nor decided. It was not a case of a devise to a corporation holding at the time of the devise more property than the law permitted, and where the question was whether such devise was good, and, if bad, whether the property (not devised by a valid devise) passed to the heirs.

The defense of the defendant was, among others, adverse possession, and that defense prevailed. The case referred to by the vice-chancellor (*Humbert v. Trinity Church*, 24 Wend. 587, 604, 629) did not decide the question either. The ground of the decision was that the plaintiff's claim was barred by the statute of limitations. COWEN, J., says (p. 605): "Admit that the law will cast no title on the corporation, the answer, in the words of the statute, is equally fatal. You have been out of possession for more than twenty years, and are thus disqualified to maintain an action to recover your land against us or any other." It was a decision upon a question of adverse possession.

Senator FURMAN (page 629), in his opinion, assumes from the evidence that the real estate, when received, counting all defendant ever had, did not amount to the limitation of £500. He adds, in giving another view of the case, that the "restriction is a mere question of governmental policy, and individuals, as such, have nothing to do with it, and no control over it. That it is only voidable at the instance of the supreme power." He cited no authorities and the question was not before him.

The case is only authority for the proposition that a corporation can insist upon a title to property by adverse possession, which when proved is as potent to close the mouth of a claimant to the property in the case of a corporation as in that of an individual. To same effect, *Harpending v. Dutch Church* (16 Pet. 455); *Bogardus v. Trinity Church* (4 Paige, 178).

Then comes the case of *De Camp v. Dobbins* (29 N. J.

Opinion of the Court, per PECKHAM, J.

Eq. 36), which was a devise to a charitable corporation claimed to have been restricted to a holding of property to the amount of \$2,000 annual value. The chancellor found that by a later statute the restriction did not exist. He then gave a *dictum* that if a corporation takes land by grant or devise, in trust or otherwise, which by its charter it cannot hold, its title is good as against third persons and strangers; the state alone can interfere.

This *dictum* is opposed by another distinguished judge of New Jersey (Chief Justice BEASLEY), who, on appeal to the Court of Errors and Appeals in the same case, took occasion, in delivering the unanimous opinion of the court, while affirming the judgment below, to dissent from any such view of the law. I shall have occasion to refer to the case again. (*De Camp v. Dobbins*, on appeal, 31 N. J. Eq. 671, 690.) The New Jersey case cannot, therefore, be regarded as the least authority for the main proposition under discussion.

The last case cited by the learned justice is that of *Davis v. Old Colony Railroad Company* (131 Mass. 258-273). The case decides that a railroad company had no power to guarantee the payment of the expenses of a musical festival, although it was expected that profits would result to the railroad company therefrom.

Incidentally, and as part of the general argument, the court, in the opinion at page 273, mentions the doctrine contained in the *Leazure Case* (*supra*), and in *Old Colony Railroad Corp. v. Evans* (6 Gray, 25). Neither case decides the question, and it was not involved in either. This completes the examination of the cases cited in the opinion in *Jones v. Habersham*, and I think that it cannot be said that they really furnish any very secure foundation for the doctrine contained in that case, and I think the doctrine is opposed to the principle of the *Chamberlain Case* (*supra*), decided by this court. The other cases cited in the printed argument of the counsel for the appellant, are mostly cases where a corporation has contracted with parties on a valid consideration, and where a conveyance has been made and then it is sought to raise the

Opinion of the Court, per PECKHAM, J.

question as to the power of the corporation to take or convey a title, and it has been held that in such cases of an executed contract, if the corporation has violated the statute, the parties seeking to set up such violation would not be heard, and in such case none but the state would be. That one who contracts with a corporation shall not, under such circumstances, be heard to raise the question, is, in substance, the principle decided.

Such are the cases, in substance and principle, of *Cowell v. Springs Co.* (100 U. S. 55); *Hough v. Cook Co. Land Co.* (73 Ill. 23); *Alexander v. Tolleston Club of Chicago* (110 id. 65); *Barnes v. Suddard* (117 id. 237); *Cal. Tel. Co. v. Alta Tel. Co.* (22 Cal. 398); *Natoma Water Co. v. Clarkin* (14 id. 544); *Haywood v. Davidson* (41 Ind. 212); *Baker v. Neff* (73 id. 68); *C. B. & Q. Co. v. Lewis* (53 Iowa, 101); *Land v. Coffman* (50 Mo. 243); *Chambers v. City of St. Louis* (29 id. 576); *Barrow v. Nashville, etc., Tel. Co.* (9 Humph. 304); *Baker v. Northwestern Guaranty Co.* (36 Minn. 185); *Missouri, etc., Co. v. Buchwell* (2 Neb. 192). I have examined all of these cases, and while the facts are, of course, not precisely similar, yet in not one of them does the fact exist of a devise of property to a corporation which it cannot hold, because the limitation has been reached provided for by statute, and, of course, no doctrine that in such a case the heirs cannot claim the property, is advanced.

In most of them the court looks upon the question as one of a forfeiture of the charter on account of a violation of some limitation therein contained, and in such case, it is said, none but the sovereign can raise such question.

The case of *Hayward v. Davidson* (41 Ind. 212), was that of a devise of real estate to county commissioners for the use of the county. The court held that the county was authorized to acquire and hold title to real property for some purposes, and it could not be made a question by any one, except the state, whether or not real estate acquired by such county has been thus acquired for authorized purposes or not. That the *title passed* under the power of the county to take

Opinion of the Court, per PECKHAM, J.

real estate for some purposes, but the court also said if the charter or the law has forbidden a corporation to take, then a deed or devise passes no title.

In the case at bar, where the statute authorizes the corporation to hold not exceeding a limited amount, is it not the same thing, in substance, as a prohibition against holding and, therefore, a prohibition against taking any more? And when the limit is reached, is it not the same as an original prohibition against taking any? In *Chambers v. City of St. Louis* (*supra*), the court held, also, that there was a right in the city to take and hold lands, and if there were a capacity in the vendor to convey, so soon as there was a conveyance there was a complete sale, and if the corporation, in purchasing, violates or abuses the power to do so, *that is no concern of the vendor or his heirs*. It is a matter between the state and the city. This case rests upon the same principle above alluded to.

In the case of *Vidal v. Girard's Executors* (2 How. [U. S.] 127), the trusts created by the will of Stephen Girard were held valid, and the court said that in such a case, if the corporation were incompetent to execute them, the heirs could not take advantage of such fact, as that could only be done by the state by *quo warranto* or other judicial proceeding. This is upon the ground that the *trust was a valid trust*, and if so, and the corporation, as such, had no power to execute it, the trust did not, for that reason, fail, but upon the failure of the corporation for lack of power, to execute it, a court of equity would appoint a new trustee. Of course, the heirs had no interest in the question when once the trust was declared valid, whether the corporation was exceeding its power in taking upon itself the execution of the trust or not. They had no title to or any further interest in the property. They stood, therefore, in respect to the corporation, as any other strangers. The case does not aid the appellant upon the matter under review.

I have not yet referred to all the cases cited by the indefatigable counsel for the appellant, but I have read them all,

Opinion of the Court, per PECKHAM, J.

and in not one is the question fairly up and decided in the way he asks the court to decide this case.

The cases decided by the Supreme Court of the United States, known as the National Bank Mortgaging Cases, are cited to sustain the view of counsel. (*National Bank v Whitney*, 103 U. S. 99; *Fortier v. New Orleans Nat. Bank*, 112 id. 439.)

They were cases where the bank took a mortgage from a party to secure future advances (against the act of congress), which advances it subsequently made, and for the non-payment of which it attempted to foreclose the mortgage, when the mortgagor set up the violation of the act. The court held that the act did not make the security void, and that the government meant that the only penalty should be the right of the government to proceed against the bank for a judgment of ouster and dissolution. Certainly the party who had contracted with the bank, and had obtained its money on the faith of the security, had no equity in his claim. It is not, however, in the least analogous to the subject under discussion. Yet, even in that case, this court held that the mortgage was void because taken in violation of the national banking act (*Crocker v. Whitney*, 71 N. Y. 161), and it was stated, as the undoubted law of this state, that a contract made in violation of a statute is void, and it is immaterial that it is not so declared in the statute itself, and that a security taken in violation of a statute is void.

As the case involved the construction of an act of congress an appeal was taken to the Federal Supreme Court, where the judgment was reversed and the penalty for a violation of the act was held to consist in the right of the government to proceed against the bank for a forfeiture of its charter, and the security was held valid.

The counsel refers to the general doctrine of *ultra vires* in respect to corporations, and shows that, as matter of fact, corporations have power to violate the law of their existence, or, in other words, to do wrong; and he cites *Bissell v. Railroad*,

Opinion of the Court, per PECKHAM, J.

Company (22 N. Y. 259); *Whitney Arms Company v. Barlow* (63 id. 63); *Atlantic State Bank v. Savery* (82 id. 292); *Rider, etc., v. Roach* (97 id. 378).

The theory upon which the plea of *ultra vires* is examined is that it will not, as a general rule, prevail whether interposed for or against a corporation, when it will not advance justice but will accomplish a legal wrong. (See above cases.)

I do not perceive that any assistance accrues to the appellant from a presentation of this doctrine. There is no question between these parties of a contract nature, nor any fact which ought to preclude the respondents from setting up any legal bar to the right of the corporation to take title to property which they claim either as heirs-at-law or as legatees or devisees.

The cases of the *Elevated Railroad* (70 N. Y., 327, 338) and *Moore v. Brooklyn, etc., Railroad* (108 id. 98, 104) are cited to show that none but the sovereign can take advantage of a forfeiture of the charter, and that must be in a direct proceeding against the corporation. The principle is undenied. But in a case like this it is no forfeiture that is being insisted upon. It is simply a question of title to the property, and, provided it has not been legally devised or bequeathed, it necessarily vests in the heir or next of kin.

But it is said that where property is given to a corporation which has power to take or hold under some circumstances, the title vests in the corporation, for otherwise the state would never obtain the right to forfeit even the charter for a violation thereof. The argument is, the corporation would answer a claim to forfeit the charter by the fact that the charter precluded it from taking such property, and, therefore, as it could not, it had not done so. I do not see the force of the argument. The charter may preclude the rightful taking of the property by the corporation, and may prevent the legal title from vesting in it, but that has nothing to do with the fact that, nevertheless, the corporation has, as a physical act, taken the property and may be insisting upon its right to keep it as matter of law. In such case can there be any doubt that the corporation has taken and is holding the property as its

Opinion of the Court, per PECKHAM, J.

own and in defiance of the charter, and that it may be punished by having its charter forfeited, although the rightful owner of the property may thereafter obtain his own? The fact that he does obtain it is no answer to the other fact that the corporation had taken it, nor is it any legal answer to the claim of forfeiture of the charter, on the part of the state, that it was unsuccessful in continuing to hold the property against the charter provisions.

Although we never adopted or enacted the English statutes of mortmain, yet in this, as in other states, we have a decided mortmain policy. It is found in our statute in relation to wills, prohibiting a devise to a corporation unless specially permitted by its charter or by some statute to take property by devise.

"It is a statute of mortmain, resting on a mortmain policy as distinctly as any act of the British parliament. * * *
 "The necessity is recognized of forbidding the acquisition by will, unless the legislature, in granting the charter, and in full view of the reasons for so doing, think proper to confer the power in express terms. * * * Nor is this necessity by any means a fanciful one. It is eminently praiseworthy to give in the interest of charity and religion. But in the last hours of life exaggerated impressions of charitable or religious duty often obscure the judgment of men and subject them to undue influence and persuasion. Against these the statute is intended to guard, because it is in behalf of associations incorporated for pious and benevolent purposes that the sentiments of men in such situations are most generally appealed to. *The enactment is, therefore, prohibitory and it ought to be expounded and applied in that sense.*" (Per COMSTOCK, Ch. J., in *Downing v. Marshall*, 23 N. Y. 366, 387.)

"Judges have given the widest possible scope to statutes in restraint of the disposal of property in mortmain, and have been astute in their arguments for the application of such statutes to cases as they arose. (Per GIBSON, Ch. J., *Hillyard v. Miller*, 10 Penn. 326.) The courts ought not to impute an

Opinion of the Court, per PECKHAM, J.

"intent to the legislature not clearly expressed, in direct
"hostility to the traditions and policy of the past. * * *
"Claiming property and seeking the aid of the courts to
"reach it, the corporation can rely only on the warrant and
"authority conferred by law, and cannot claim in transgression
"or excess of that authority. * * * Doubtless, the
"restriction upon corporations is a governmental regula-
"tion, and one of policy, and to be enforced by the govern-
"ment; but an individual whose interests will be affected by
"a transgression of the rule, may assert and insist upon
"the limitation as a restriction upon the power of the cor-
"poration to take." (Per ALLEN, J., in *Chamberlain v. Chamberlain*, 43 N. Y. 424-439.)

Under our general statutes upon the subject of the right to take or hold property by corporations, and reading them in connection with the provisions of the charter of the university, we should be astute in our arguments *against* the application of the mortmain statutes instead of in favor of them, if we should decide that the language of the charter did not apply as well to a taking as of a holding of property beyond the expressed limit.

There can be no doubt that it is the law, in this state at least, that if there be a prohibition against the taking of property beyond a certain amount or value, a devise or bequest to a corporation of property which will exceed the amount or value which the corporation is permitted to take, will be void for the excess. This is expressly decided in the *Chamberlain Case*, and we think it was rightly decided. Nor is there any doubt that in such a case the heirs or next of kin can raise the question. This was also decided in the same case. (See, also, *White v. Howard* (46 N. Y. 144). When we come to the conclusion, therefore, that this university is by law precluded (or was precluded at the time of the death of Mrs. Fiske) from taking more than the amount of property limited in its charter, we bring the case precisely within the rules laid down in the cases just cited.

The language of Chief Justice BEASLEY, in the case of

Opinion of the Court, per PECKHAM, J.

De Camp v. Dobbins (31 N. J. Eq. 690), is very appropriate here. He says: "Nor can I assent to the other proposition that if, as the contention assumes, this bequest is violative of the law if carried into effect, that none but the state can intervene. I find no warrant for such a doctrine, either in the legal principles belonging to the subject or in the adjudications. There can be no doubt that there are cases in which, where a corporation has acquired rights of property to an extent or in a manner unwarranted by its charter, no one but the public can have the right to complain. A grantor making title to a corporation might be estopped from questioning the effect of his own conveyance. So a mere stranger could not question such a corporate title. But I have not observed any decision that asserts, where a title is created by devise which vests in a corporation for its own use a larger quantity of property than the laws authorize, that the heir-at-law has no right to make objection. The authorities referred to do not lend countenance to such a doctrine." The learned judge refers to the cases of *Bogardus v. Trinity Church* and *Leazure v. Hillegas* (both cited *supra*), and continues: "These cases rest on the obvious principle that the capacity of the corporate body to become the grantee in the given case cannot be challenged by a party who does not stand in a position to raise the question. In such a position it would be true that the state alone could object to such corporate act. But such instances are to be discriminated from that other class, where the corporation claims to take and hold by devise, in contravention of law, and the heir of the deviser is the party complaining. In this latter situation the doctrine enforced in the cases does not apply. * * * I have no doubt that the heir-at-law has a standing in court to raise such a contention, and that in a court of equity he would be entitled to prevail if he could succeed in establishing the proposition on which such defense rests." The court affirmed the judgment below on the ground that the corporation was not prohibited from taking the property.

Opinion of the Court, per PECKHAM, J.

The counsel claims, however, that a devise to a corporation vests the title in it, so far as the question of capacity is concerned, whenever it would in the case of a sale for a valuable consideration. Hence he says that the cases of sales above cited are decisive of this, if they be admitted as well decided. In the case of an executed sale, however, the question of *ultra vires*, as set forth in the modern cases, comes in play, and the question of a want of title in the corporation in such case would not be permitted to be raised by the grantor or his heirs, because it would be against justice and would accomplish a legal wrong. (*Whitney Arms Co. v. Barlow*, 63 N. Y. 62.)

The question of an executed gift without consideration by a donor, by an absolute delivery to a corporation without power to take, is also instanced, and the question is asked whether the title vests in such a case in the corporation so that the donor or his heirs could not recover it back, and if it do, the counsel asks where is the difference in the two cases. It is time enough to decide such a case when it arises. But it seems to me there is a decided difference. In the one case the gift is made *inter vivos* by the absolute owner, and it is made effectual as to him by a delivery. In such case it would seem that *he* stands in no position to ask the aid of the court to get him out of a situation into which he voluntarily entered with his eyes open, and the court might well say to him that he stood in no position to attack the right of his donee to property which he freely and absolutely gave it. As to his heirs it could be said that their ancestor had made a disposition of property which was absolutely his own in his lifetime, and in such a way that he could not question its validity, and that as *he* could not, they succeeding only to his rights, were alike disabled.

In the case of a devise, however, the case is essentially different. The will does not take effect until the testator's death, and then, if his property is not legally devised or bequeathed, no title vests for a single moment in the devisee, or legatee, but it vests instantly in the heir or next of kin;

Opinion of the Court, per PECKHAM, J.

and the corporation claiming under the will asks the aid of the law to give the property to it, and in so doing it must show the authority it has to take. And if there were only a prohibition in words against *holding* the property, would the law not be doing a vain thing in handing it over to a corporation which by the very fact of holding would render itself liable to have its charter forfeited on that account? Would not the prohibition against holding be properly and necessarily construed as a prohibition against taking also?

Is not this an argument against the right of the corporation *to take*, if by *holding* it is thus rendered liable to such a penalty? And is it not an argument in favor of the construction of the language in the charter that the limitation upon the power to hold property is, under all the circumstances, a limitation upon the power to take any more than it can legally and properly hold?

One more statement must be noticed. It is said that as the legislature, subsequently to the death of Mrs. Fiske, passed an act which took away any limitation on the power of the university to hold property, this action of the legislative department of the government throws a strong light upon what is the policy of the state regarding institutions of learning, and, in the view of appellant's counsel, waives the right which might have existed on the part of the state to claim a forfeiture of the charter of the corporation. But the policy of the state in relation to what may be called its mortmain laws is to be gathered from its statutes of general application on that subject, and cannot be said to be altered by the passage of special acts regarding particular corporations.

Nor do I think the counsel for appellant shows any change in the general policy of the state by referring to the acts of 1840 and 1841, already cited, as indicating a purpose to open the door to an unlimited accumulation of property by educational institutions in general. Those acts, as has been said, did not enlarge the capacity of corporations to take property more than they could take under the general laws. The act of 1864, as to union and high schools, by which the board of

Opinion of the Court, per PECKHAM, J.

education has power to take and hold property for educational purposes, and where permission was given to bequeath property to the state or to the superintendent of public instruction for the support or benefit of common schools, or to any county or district school commissioner, for such support, does not betray any change in the policy of the state upon this subject. The bequests spoken of are to the political subdivisions of the state or to the state itself as a corporation, but in its political capacity, and the property remains to be administered by the state officials or the officers of such political subdivisions, for the purposes of education in the common or high schools which the people are taxed to support. This is an entirely different thing from gifts to what may be termed a private educational establishment. Our courts have been quite unanimous in their opinions as to what the policy of the state was and is on this matter ; and the extracts I have made regarding it, from the opinions of two very eminent former judges of this court, could be added to very largely by citing opinions of other judges in our own state, but it is not necessary.

However perfect may be the waiver in the act alluded to, of the right of the state to forfeit the charter of this university on account of any alleged violation thereof, such act can, of course, have no possible effect upon rights of property which vested at the death of Mrs. Fiske and before the passage of the act in question. (*White v. Howard*, 46 N. Y. 144.)

The counsel asks what is to be done in regard to the real property in other states, if we hold this corporation has no power to take any more property ? It is said the surrogate has found, as a *fact*, that the university had legal capacity to take and did take by devise all the real property the title to which was in Mrs. Fiske at the time of her death, in those states. He says the title to real estate is governed by the laws of the states where the real property is situated. And that in the states in question it is held that a corporation can take under such circumstances as this case. This will devise no real estate to Cornell University.

It gives to the university \$40,000 in trust for the erection

Opinion of the Court, per PECKHAM, J.

and furnishing and support and maintenance of a hospital; \$50,000, in trust, for completing and perfecting the McGraw building; \$200,000, in trust, for the McGraw library fund, and it gives and devises the residue of the property of the testatrix, if any, to be added to the last mentioned fund. It then directs that the estate of the testatrix shall be converted into money or available securities by her executor as soon as it can be done, having in view the best interests of the estate. This direction to convert operated as an equitable conversion of the estate of the testatrix into money or available securities, and hence no real estate in other states has been devised by her to the university. It is needless to inquire what would have been the rule in case real estate in other states had been specifically devised to the university, while this court should at the same time decide that it held property up to its charter limit, and that it had no capacity to take or hold any more real or personal property than the amount specified in its charter.

Upon a review of the whole question as to the proper construction of the legislation, general and special, affecting this university, I am of the opinion that it had no power to take or hold any more real and personal property than \$3,000,000, in the aggregate.

Second. Coming to the conclusion I have, on the first branch of the case, it becomes necessary to examine the second and only remaining question, viz.: Does this property, if taken and held by the university, exceed the amount which by law it can hold?

The decision of such question depends partly upon the view which should be taken of the character of the holding under which the university now possesses certain property, which is described in the finding of the surrogate as property derived from the nation and state, and which he finds amounted to \$2,088,012.78, and which was made up, as he also finds, of western land contracts, \$439,834.22, and of western lands to the amount of \$1,648,178.56; and he states, as part of his

Opinion of the Court, per PECKHAM, J.

finding, that this total of \$2,088,012.78, was due or payable by the university to the state, or, in other words, that the university owed the state that sum, and consequently it should not be regarded as any part of its property. This finding has not been concurred in by the General Term, which has modified it by holding that the same is to be taken into account as part of the property of the university.

The state of facts under which the question arises is undisputed, and it becomes a question of law as to what is the proper legal inference to be drawn from the undisputed facts, and the decision of that question is reviewable in this court.

Stated as briefly as may be, the facts are these: In July, 1862, the congress of the United States passed "An act donating the public lands to the several states and territories which may provide colleges for the benefit of agriculture and the mechanic arts." A certain proportion of the public lands was in and by this act donated to the different states for the purposes above expressed, but to such donation or grant there were attached several conditions, among which were these:

(a.) The lands should be selected in the state making the selection, if there were public lands enough within it to permit it, if not, the secretary of the interior was directed to issue to each of the states land scrip to the amount in acres for the deficiency, which scrip was to be sold by the state and the proceeds thereof to be applied to the uses and purposes prescribed in the act, and for no other use or purpose whatever.

(b.) In no case should any state, to which land scrip was issued, be allowed to locate the same within the limits of any other state or territory in the United States, but their assignees might locate it upon any of the unappropriated lands of the United States.

(c.) All expenses of management, superintendence and taxes from the date of the selection of lands previous to their sale, and all expenses for the management, etc., of the moneys received from such sales, were to be paid by the state, so that the entire proceeds of the sales of the lands should be applied to the purposes named.

Opinion of the Court, per PECKHAM, J.

(d.) All moneys derived from the sale of the lands by the states to which they were apportioned, and from the sales of land scrip, were to be invested by the state in stocks of the United States or of the states, or some other safe stocks, yielding not less than five per cent upon the par value of such stocks, and the moneys so invested were to constitute a perpetual fund, the capital of which should remain forever undiminished, and the interest of which should be inviolably appropriated by each state to the endowment and maintenance of at least one college where, among others, agriculture and the mechanic arts should be taught.

(e.) If any portion of the invested fund, or any portion of the interest thereon, should by any action or contingency be lost or diminished, it was to be replaced by the state to which it belonged, so that the capital of the fund should remain forever undiminished, and the annual interest should be regularly applied without diminution to the purposes mentioned in the act. To these conditions the state was required to give its assent by legislative act, and the grant was only authorized upon the acceptance of them by the state.

Any state taking the benefit of the provisions of the act was required to provide, within five years, at least not less than one college as provided in the act. This state, by an act passed May 5, 1863, duly accepted the grant and gave its assent to the conditions thereof. The comptroller was authorized to receive the land scrip (as the state had no public lands of the United States unappropriated within its borders), and to sell the same and to make all necessary arrangements, employ agents, etc., as he deemed expedient for effecting a judicious sale of such scrip. Land scrip representing 989,920 acres of land was then issued by the secretary of the interior to the comptroller, and was embraced in 6,178 pieces of scrip for 160 acres each. The comptroller sold about 76,000 acres at the rate of eighty-five cents.

In 1865 the legislature chartered Cornell University, as a compliance on the part of the state with one of the conditions upon which it received the land scrip, and in the charter the

Opinion of the Court, per PECKHAM, J.

income, revenue and avails which should be received from the investment of the proceeds of the sale of the land scrip were appropriated to the university, and were to be paid over to the trustees thereof for its use and for the purposes defined in the act of congress. This gift, however, was upon the condition that Ezra Cornell should give \$500,000 to the university and \$25,000 to the trustees of Genesee College at Lima, in this state. Both gifts were made by Mr. Cornell.

Congress having donated this immense amount of land, upon the conditions named in the act, and the state having accepted such gift upon the conditions named, and having received the scrip and incorporated the university, and appropriated to it the income arising from the interest on the proceeds of the sales of such scrip, and the university having received the gift of half a million from Mr. Cornell, the great question then arising was in regard to the best means of disposing of such scrip for the best price, so that the income for the university should be increased to the greatest extent therefrom. The result of throwing into market such an enormous amount of the public lands as had been donated by congress to the several states was a fall in the market-value of the land; and, of course, of the scrip which represented it. In the fall of 1865 Mr. Cornell had purchased some scrip of the comptroller, representing 100,000 acres for \$50,000, and had given his bond for that sum upon condition that all the profits which should accrue from the sale of the land should be paid to the Cornell University. In this condition of matters the legislature passed an act (April 10, 1866) which is as follows:

“SECTION 1. The comptroller is hereby authorized to fix the price at which he will sell and dispose of any or of all the lands or land scrips donated to this state by the United States of America, by act of congress approved July second, eighteen hundred and sixty-two, and entitled ‘An act donating public lands to the several states and territories, which may provide colleges for instruction in agriculture and the mechanic arts.’ Such price shall not be less than at the rate of thirty

Opinion of the Court, per PECKHAM, J.

cents per acre for said lands. He may contract for the sale thereof and sell the same to the trustees of the Cornell University. If the said trustees shall not agree with the said comptroller for the purchase thereof, then the commissioners of the land office may receive from any person or persons an application for the purchase of the whole or any part thereof at the price so fixed by the said comptroller, and may, if they are satisfied that the said person or persons will fully carry out and perform the agreement hereinafter mentioned, sell the same, or any part thereof, to the said person or persons. But said trustees, or such person or persons, shall at the same time make an agreement and give security for the performance thereof to the satisfaction of the comptroller, to the effect that the whole net avails and profits from the sale of scrip, or the location and use by said trustees, person or persons, of the said lands, or of the lands located under said scrip, shall from time to time, as such net avails or profits are received, be paid over and devoted to the purposes of such institution or institutions as have been or shall be created by the act chapter five hundred and eighty-five of the Laws of eighteen hundred and sixty-five of the state of New York, in accordance with the provisions of the act of congress hereinbefore mentioned. And the said trustees, person or persons to whom the said lands or scrip shall be sold, shall report to the comptroller, annually, under such oath and in such form as the comptroller shall direct, the amount of land or scrip sold, the prices at which the same have been sold and the amount of money received therefor, and the amount of expenses incurred in the location and sale thereof.

“§ 2. The comptroller is authorized, from time to time as he shall see fit, to make such examination into the actions and doings of his vendees of said lands or scrip therewith as he shall deem necessary to ascertain and determine what are the net avails of the said lands or scrip from the sale or from the location and use thereof by his said vendees.

“§ 3. This act shall take effect immediately.”

Opinion of the Court, per PECKHAM, J.

Under this act the comptroller fixed the price of the land at fifty cents per acre, which, under all the circumstances, was considered a fair amount.

The trustees of the university did not apply to purchase the scrip under the act of 1866, and on the 4th of August, 1866, the commissioners of the land office made an agreement with Ezra Cornell for the sale to him of all the remaining scrip undisposed of, represented by 5,087 certificates of 160 acres each.

The agreement was entered into between the commissioners and Mr. Cornell, under the authority of the above-quoted act of 1866, and as the decision of the question turns to a large extent upon the proper construction and meaning of this agreement, it is thought better, although the agreement is quite long, to insert it in full so the whole force and effect of the same may be observed. It is as follows :

“ This agreement, made this fourth day of August, eighteen hundred and sixty-six, between the people of the state of New York, through their commissioners of the land office, acting under and by virtue of chapter 481 of the Laws of 1866, of the first part, and Ezra Cornell, of Ithaca, New York, of the second part, witnesseth : That the said party of the first part hereby agrees to sell and assign and deliver to the party of the second part, all of the agricultural land scrip now in the possession or ownership of the state of New York, consisting of five thousand and eighty-seven certificates, each representing one hundred and sixty acres, on the following terms and conditions :

“ *First.* That said party of the second part shall receive said scrip from time to time, as the same can be judiciously located, in parcels representing not less than twenty-five thousand acres, paying therefor into the treasury of the state, on its assignment and delivery to him by the comptroller, at the rate of thirty cents per acre, in lawful money of the United States, or of the state of New York, or in other good and safe stocks or bonds, to be approved by the comptroller, and drawing not less than five per cent interest per annum, and at the same time depositing with the comptroller stocks or bonds to be

Opinion of the Court, per PECKHAM, J.

approved by him, to an amount equal to an additional thirty cents per acre, as security for the fulfillment by the party of the second part of the conditions of this agreement, so far as they relate to the execution of a mortgage to the state on the land to be entered and located with said scrip, on the fulfillment of which, said stock or bonds, so deposited as security, shall be returned to said party of the second part.

"Second. That whenever any parcel of scrip sold and delivered to the said party of the second part, under and by virtue of this agreement, shall have been located by him or his agents, the said party of the second part hereby agrees that he will without delay furnish to the commissioners of the land office of this state, or to some member thereof to be designated by a resolution of the board, a full and complete list and description of the land so located. And the said board of commissioners shall within at least sixty days thereafter, and from time to time subsequently as may be found expedient, fix a minimum valuation by quarter sections, at which the same may be sold by said party of the second part. And said party of the second part further agrees that he will annually, and from time to time whenever required by the commissioners of the land office, render for their information to the comptroller a full, just and true account of all sales and leases made by him, said report to be made in such form and under such oath as the comptroller shall direct, and will pay into the treasury of the state the whole of the net profits arising therefrom, which shall be ascertained by deducting from the gross receipts on sales the original cost of thirty cents per acre, the cost and expenses attending the location, management and sale of said lands, the taxes assessed and paid on the same by the party of the second part, and the interest at the rate of seven per cent per annum on the several amounts actually expended and liabilities incurred for such purposes. But it is expressly agreed by the party of the second part that he will not sell any portion of said lands at a price below the minimum valuation thereon, which may

Opinion of the Court, per PECKHAM, J.

from time to time be fixed by the commissioners of the land office, without first obtaining their consent to do so in writing.

“Third. That the stipulations and conditions of this agreement shall apply to each and every parcel of scrip assigned and delivered to said party of the second part under this agreement, and the comptroller shall defer or suspend further assignments and deliveries of scrip whenever the party of the second part fails to perform such stipulations and conditions in respect to any scrip sold and delivered to him under this agreement until they have been complied with. Except, nevertheless, that stocks or bonds as security for the return and mortgage of lands located under scrip to the party of the second part, shall in no case be required when there shall remain in the hands of the comptroller, by virtue of this agreement, mortgaged lands not released equal in quantity to the scrip which may be issued to the party of the second part, and remain not located and mortgaged as provided by this agreement.

“Fourth. That as often as and whenever the party of the second part shall furnish a description of any of the lands selected and located by him under and by virtue of said scrip, he shall immediately execute a mortgage thereon to the people of this state to be approved by the attorney-general, conditioned that the said party of the second part will fully keep and perform each and every of the terms and conditions he is required to do, keep and perform. And this agreement is declared to be a continuing agreement, and a suit or suits at law or in equity may be from time to time instituted and maintained thereon, and upon any or all of said mortgages, for any violation of such terms and conditions, whenever such violation may occur. Said mortgages shall be delivered to the comptroller or to the commissioners of the land office.

“Fifth. Whenever the party of the second part shall sell or dispose of any section of the lands acquired by him under this agreement and pay into the treasury of the state the net profits resulting from such sale, after the deductions hereinbefore mentioned and provided for, the party of the first part

Opinion of the Court, per PECKHAM, J.

shall execute and deliver to the party of the second part a full and sufficient release of the portion sold from the lien of the mortgage, so that a clear title can be vested in the purchaser or purchasers.

"Sixth. That of the moneys arising from sales or leases made by the party of the second part, and paid into the state treasury as herein provided, a proportion equal to thirty cents per acre shall be added to and form a part of the fund known and designated on the records of the comptroller's office as the "College Land Scrip Fund," and the remainder shall constitute a separate and distinct fund, *which shall be the property of the "Cornell University," to be known as the "Cornell Endowment Fund,"* the principal of which shall forever remain unimpaired, the income to be annually appropriated by the legislature, and paid over from time to time to the trustees of the Cornell University, to be by them devoted to the purposes of the institution.

"Seventh. That the said party of the second part further agrees to purchase the whole of the aforesaid scrip, and select and locate lands under and by virtue thereof, and execute mortgages thereon, as hereinbefore provided, within four years from the date hereof, and that he will sell the lands within twenty years from date, and pay the net profits arising from such sales into the treasury of the state, and that until the same shall be sold and the net profits so paid, he will pay all taxes which may be assessed thereon, and preserve and maintain a title thereto unimpaired, to which the liens created by said mortgages shall attach.

"And if any event shall occur making it needful for the people of this state to incur any expense to preserve the lien of said mortgages, the same shall be paid out of the proceeds of said lands. And if, after the expiration of the period of four years hereinbefore fixed, any of said scrip shall remain with this state, and not have been paid for by the party of the second part, the same shall be released thereafter from the conditions and stipulations of this agreement."

Opinion of the Court, per PECKHAM, J.

There was no sum provided in the act of congress for the sale of the scrip. It was in the discretion of the state to sell it at any price it could obtain either at public or private sale; and it could sell the whole or any part of such scrip at any time, but the proceeds of such sale were to be invested under the act of congress and the income applied as therein provided for. If there be any ambiguity in the meaning of the agreement as a whole, it is not improper to see what meaning was attached to it by the persons who executed it, if possible, and also to look at the surrounding facts so that we may place ourselves in the same position as the contracting parties and thus learn what was in contemplation. It is known that at the time of the passage of the act of April 10, 1866, sales of the scrip had almost ceased.

It was thought that there was a good chance that the land which might be located under this scrip would, in the future, greatly appreciate in value, and it was the wish of those interested in its welfare that the university should, in some way, reap the benefit of this increase. But it had no funds to purchase the scrip, and it needed ready money as an income to aid it in the discharge of its duties as an educational institution. Hence the problem was to find some one who would purchase the scrip and pay for it and then locate and sell the lands at the higher prices which it was hoped they would attain and give the profits to the university. A glance at the correspondence between Mr. Cornell and the comptroller, and at the minutes of the proceedings of the land commissioners, and the other evidence in the case, shows that there was no one else than Mr. Cornell who was ever thought of as a person who would take upon himself such burdens, troubles, labors and responsibilities for the purpose of giving away all the profits which might, in the future, arise from such sales. It is seen by reference to that correspondence that Mr. Cornell and the comptroller differed in regard to the construction of the act, the comptroller holding that the act really meant that the net avails of the scrip should be placed under the custody of the state, while it may be inferred that the idea of

Opinion of the Court, per PECKHAM, J.

Mr. Cornell was that the *profits*, after paying the original thirty cents, and the additional thirty cents (if realized) as the purchase-price of the scrip, might be placed as he should choose, provided the university should receive the benefit of the whole income arising from such profits. Under date of June 9, 1866, Mr. Cornell, in his letter to the comptroller, speaks of his differing with the comptroller in his construction of the law, but adds: "Appreciating, as I do most fully, your motives for desiring to give the utmost possible security and permanency to the funds which are, in a great degree, to constitute the endowment of the Cornell University, I shall most cheerfully accept your views so far as to consent to place the entire profits to be derived from the sale of the lands to be located with the college land scrip in the treasury of the state, *if the state will receive the money as a separate fund from that which may be derived from the sale of scrip and will keep it permanently invested and appropriate the proceeds from the income thereof annually to the Cornell University, subject to the direction of the trustees thereof, for the general purposes of the institution, and not to hold it subject to the restrictions which the act of congress places upon the fund derivable from the sale of the college land scrip or as a donation from the government of the United States, but as a donation from Ezra Cornell to the Cornell University.*"

Mr. Cornell thus plainly understood that the purchase-price of the scrip from the state was thirty cents an acre, with a possible thirty cents more if he should realize that sum on the sale of the land, and that any sum beyond that came to him as profits on his sale of the scrip or land to third parties, and that sum, being his own profits, he was willing to donate to the university, and for that purpose to pay the same into the treasury of the state, the same to be invested and the income therefrom to be paid by the state to the university for the general purposes of the institution, and not as part of the purchase-price of the scrip to be invested under the act of congress. It was after the receipt of this letter that the

agreement was made, the subdivision (six) containing, in substance, the provision asked for by Mr. Cornell.

While in some portions of this agreement, if read alone and laying aside all knowledge of the contemporary history of the events surrounding it, there might arise some doubt as to the meaning of such portion, yet when read as a whole, and in the light of those events, I think no real and grave doubt can exist as to the meaning of this instrument. It seems clear to my mind that the state sold this land scrip at thirty cents per acre, with an additional thirty cents if so much should thereafter be realized upon the sale by the vendee of the state, and that this constitutes the purchase-price of such scrip, which when assigned to Mr. Cornell by the state, in accordance with the terms of the contract, he became the legal owner of. He, it is true, also agreed that his profits should be paid into the treasury of the state, but they were to be paid therein *as profits*, and not as any portion of the purchase-price of the scrip, and they were to be paid, and were in fact paid, as profits of Mr. Cornell, and they were received under that agreement as the property of the Cornell University, the income of which was to be paid to it for its general purposes, and the principal was to constitute the Cornell endowment fund. I cannot see that in all this there was nothing but an agency created in behalf of the state, and that Mr. Cornell was such agent, and that the whole profits realized were really nothing but the proceeds of the sale of the lands by the state. The state, on the contrary, by the very terms of the agreement sold the scrip, and the legal title, by patents from the government of the United States, was vested in Mr. Cornell when he located the lands under the scrip which he had purchased, and took out his patents upon such location. Neither can I see that the purchaser of the scrip gave or intended to give or was supposed to give his profits as part of such purchase-price. His agreement is plain, and in it he stated what such purchase-price was, and what he would give for the scrip, and the fact that he agreed to pay his profits, if any were realized, into the treasury of the state, as the property of the

Opinion of the Court, per PECKHAM, J.

university, which was to have the income thereof paid over to it for its general purposes, does not, to my mind, render such profits any portion of the purchase-price of the scrip. They were profits which he hoped to be able to realize in the future, but were entirely speculative in character and amount, dependent largely upon the judgment with which the lands were located, and the time and manner of their sale. All this Mr. Cornell was willing to do for this university, but the agreement shows that he was to do it as a gift of his own, and not as a mere agent of the state or of the United States; and that all the compensation he sought for his services, his trouble and his responsibilities, great and onerous as they were, was the fact that all this should go to the university as his gift, and the state became the custodian of the profits under a duty to appropriate the income to the trustees for the general purposes of the university.

The counsel for the institution may be entirely right in his statements as to the law regarding this branch of the question, if he is right in the fundamental proposition as to the *profits* being a part of the purchase-price or the avails of the sale of the scrip by the state; but until he can maintain the correctness of that proposition, I do not think his argument reaches the trouble. I do not think the proposition is correct. The profits were the avails of the sale of the scrip by Mr. Cornell, not in any sense the avails of the sale of the scrip by the state. I think, also, that the agreement is fully authorized by the act of April 10, 1866. It gives the right to the commissioners of the land office to sell the scrip or any part thereof for the price which was to be fixed by the comptroller, and not less than thirty cents per acre. The right to sell the scrip at the price fixed by the comptroller was based upon the condition that the persons who purchased at such price should also agree to pay over the net avails or profits from the sale by them of the scrip or lands located under it, as they should be received, and that they should be "devoted to the purposes of such institution or institutions as have been or shall be created by the act chapter 585 of the Laws of 1865"

Opinion of the Court, per PECKHAM, J.

(the charter of Cornell University), in accordance with the provisions of the act of congress before mentioned. This does not mean that all these possible profits are to be deposited in the state treasury, subject to the same rules that would obtain in the case of the purchase-price of the scrip, but only that they shall be devoted to the institution created by the act of 1865, in accordance with the provisions of the act of congress already mentioned. Of course the purchase-price — that which was fixed by the comptroller — was to go into the treasury and be invested as provided for by the act of congress.

The reference in the above section of the act of 1866 to such institution or institutions as has been or shall be created by the act chapter 585 of the Laws of 1865, can, of course, be to none but the Cornell University, and hence the provision in the agreement that the profits shall all be devoted to that institution was proper. As that university had complied with all the conditions imposed upon it by the state as a condition to its right to receive all the income from this fund, the right to it could not be taken from it. This the commissioners of the land office stated in their report to the constitutional convention in answer to a request from that body for information as to this land scrip. And in this report, under date of July 22, 1867, the comptroller, as a member of the board of commissioners of the land office, and one of the officers who executed the contract with Mr. Cornell in August, 1866, stated as follows: "In deciding what portion of the income "of the money paid into the treasury under the agreement "with Mr. Cornell would be subject to this limitation" (set forth in the act of congress) "as to its use and application, "the commissioners of the land office assumed that the prohibition applied only to the 'purchase-money received by "the state on a sale of the scrip,' and that the ultimate profits "to be derived from the location and sale of the lands by the "purchaser formed no part of the purchase-money, and need "not, therefore, be included. The nominal price which was "fixed on the scrip by the act of 1866, and for which it

Opinion of the Court, per PECKHAM, J.

“was sold, in consideration of the stipulation to pay over the
“net profits, being less than the market rates, it was stipulated
“in the sixth section of the agreement that an additional
“thirty cents per acre from the net profits should be added to
“the purchase-money, thus increasing the price to sixty cents
“per acre, the current rate for the scrip at the date of the
“transaction, and limiting the purposes to which it may be
“applied in conformity with the terms of the grant by
“congress.”

Here, then, in addition to the language as used in the agreement itself, which, when read as a whole, seems to me quite plain, we find what Mr. Cornell was willing to do as set forth in his letter to the comptroller above quoted from, in which he claims the act permitted it, and he would donate the profits as a gift from himself to the university; and we find in an official report of one of the officers executing the contract, speaking for himself and associates, what was their understanding of this agreement. From all sources, the agreement itself, and the separate views of the parties to it, it appears the construction should be, and was, that the profits formed no part of the purchase-price or the avails of the sale of the scrip by the state (over the thirty cents per acre if realized), and that such profits belonged to the university by the gift of Mr. Cornell, the vendee of the scrip from the State, the income to be paid to the trustees of the university for the general purposes of the same.

In 1868, by chapter 554, the legislature authorized the comptroller to invest the moneys comprising the Cornell endowment fund in securities which were not authorized by the act of congress, provided such moneys formed any part of the purchase-price or avails of the sale of the scrip by the state.

This must be taken as a legislative recognition of the fact that the agreement of sale to Mr. Cornell was for thirty (possibly sixty) cents an acre, and that all profits belonged to Mr. Cornell, but that by an agreement he had agreed to give them to the university for the general purposes thereof. We

Opinion of the Court, per PECKHAM, J.

cannot assume that the state would have run counter to the express provisions of the act of congress by enacting that the purchase-price of the scrip might be invested in a manner forbidden by that act.

The commissioners appointed under a joint resolution of the legislature of 1873 reported (two out of three), that the profits formed part of the purchase-price of the scrip, the third commissioner, Horatio Seymour, not concurring and being of the contrary opinion.

The legislature took no action then upon the subject, but by the act (chap. 317 of the Laws of 1880), it directed the comptroller, upon the request of the Cornell University, to transfer to it all moneys, securities, etc., constituting a part of the Cornell endowment fund, pursuant to which act the fund was transferred to it. This was done because the university, under an agreement made with Mr. Cornell in 1874, with the consent of the comptroller and the commissioners of the land fund, had placed itself in the shoes of Mr. Cornell, so far as the contract with the state was concerned, and Mr. Cornell had conveyed to it all his right and title to the scrip, the lands located under it, and all land contracts existing. This was done at the wish of Mr. Cornell, who desired the university to take the further work under the contract, and the responsibility arising therefrom, and the university has paid to the state a portion of the amount coming to it as the purchase-price (the additional thirty cents realized) for the sale of some of the lands.

These are the material facts upon which the question discussed arises, and thus the two bodies, the state and the university, stood at the date of the commencement of these proceedings, and thus they stand now. The state has made and makes no claim that any portion of these profits over the thirty cents an acre forms any portion of the purchase-price of the sale of the scrip by it. The university, by its agreement with Mr. Cornell and by taking exactly his position, and by receiving the moneys and securities of the Cornell endowment fund by virtue of the act of 1880, clearly has taken the position

Opinion of the Court, per PECKHAM, J.

that it was the owner of this fund, and was not indebted to the state therefor. Its reports show that they (the trustees of the university) claimed that it had no debts, and they acknowledged none to the state on account of this fund.

If it existed, it would certainly be a somewhat onerous position for the state to be in. It must have all the proceeds of the sale of this scrip, including in such case all the profits of the past and what may hereafter arise; it must pay all expenses, etc., after location, in the way of taxes, and all incurred in the management and disbursement of the moneys, and must invest in stocks of the kind described in the act of congress, and must forever guarantee the whole amount, so that if any of the principal is lost, it must be supplied by the state, and it must pay over the five per cent interest on the whole of this fund to the university. This, of course, does not weigh in case the decision were that the law is in that condition. For the reasons already given, I do not think it is. Interpreted as we have interpreted the agreement and the act of the legislature of New York, the remaining inquiry is, does the New York statute, or the agreement under it, run counter to the act of congress creating this land scrip trust? I think not. It provides that all moneys derived from the sale of the land scrip by the state shall be invested, etc., as therein prescribed. The scrip is to be sold by the state, which could not itself locate the land, and the avails of such sale are to be invested. The avails of the sale of the scrip by the state were the purchase-price thereof; and if I am right, that the profits formed no part of such purchase-price, but were the property of the vendee of the state, which *he* agreed to give to the university for general purposes, as his gift and to form the property of the university, then the act of congress has no concern with it.

Another consideration may be adverted to.

It is exceedingly doubtful, in my mind, whether the university can be heard to claim the existence of this alleged debt under the facts of this case. The state has made, and makes,

Opinion of the Court, per PECKHAM, J.

no claim upon the university for the property or any portion of it. It was placed in its possession by virtue of the consent of the state, evidenced by the passage of an act authorizing and directing it. The university has claimed to be the owner of it, and no one has drawn its rightful title in question. Can it now, while enjoying, without hostile claim from any source, the full control of the property, as its absolute owner, set up, as a reason why it should be allowed to take other property, that perhaps hereafter some one may make a claim that the property does not belong to the university, but that it is a trust fund originating in the act of congress? If the state or United States were to commence some proceeding, based on the counsel's argument, to reclaim possession of the property, there is nothing in the present attitude of the university which would necessarily estop or in any way conclude it from denying that any such trust exists, or that any case had been made for taking the possession of the property out of its hands. So far as appears, it seems that this assumed indebtedness is entirely gratuitous on its part, and that there is no creditor who makes the claim, no one who questions its title. It is going a good ways, under such circumstances, to lay much weight on a liability which, up to this proceeding, was never admitted by the university, and is not now asserted by any one else. It would seem as if property, which was thus in the possession of the corporation, unclaimed by any one else, was held by it within the meaning of its charter, and that the question in regard to the character of its holding was merely an abstract one with which courts would not deal, at least so far as this proceeding is concerned.

In all these matters it must be borne in mind the parties have all been acting in the most entire and perfect good faith. This was no scheme to avoid or evade the provisions of the act of congress. The price of sixty cents an acre which the state got for the land was all it was worth at that time. Its future value depended upon many contingencies. The state had the right to sell the scrip for such price as it might agree on with a purchaser. This it did. The university wanted

 Opinion of the Court, per PECKHAM, J.

money to pay its expenses. It could not very well wait for twenty or even five years for the purpose of seeing how the value of this scrip would appreciate, if at all. The legislature was equally in earnest in its desire for the prosperity of the institution; so were the state officers, and, above and beyond all, so was Mr. Cornell, its generous founder and already the donor of such a large amount of money. Taking all the circumstances into consideration, the plan carried out was hit upon, and the amount of the Cornell endowment fund and the property arising therefrom must be regarded as a gift of the donor and founder, and not as a violation of either the act of congress, or of the act of our own legislature.

The agreement being valid and authorized by our state law, which was not in conflict with the law of congress, the position of the university with regard to property must now be adverted to.

The university stands in this position, counting the two items of western lands and land contracts as its property :

Funds from individuals	\$598,588 65
Western lands	1,648,178 56
Western land contracts.....	439,334 22
	<hr/>
	\$2,686,101 43
	<hr/>

In the first item, however, is included the university buildings, farm, grounds, etc., as fixed by the surrogate, at \$69,683.33. The General Term advances those figures by \$315,316.67, making the valuation \$385,000. Adding \$315,316.67 to the \$2,686,101.43, we have a total of \$3,001,418.10, without counting the college land scrip fund in the hands of the state as property.

We agree with the General Term in the modifications made by it in the value of the university buildings and grounds, although we are probably bound by its findings, as there was contradictory evidence in regard to it.

This brings the property of the university, above set forth,

Statement of case.

up to more than its permitted aggregate at the time of the decease of Mrs. Fiske, and no debts to be deducted therefrom.

Under such circumstances, the university could not take the various legacies bequeathed to it by her will.

The judgment of the General Term should, therefore, be affirmed, with costs.

All concur, except FINCH, J., taking no part.

Judgment affirmed.

111	132
117	11
117	20
117	36
117	39
111	132
144	407

THE BUFFALO EAST SIDE RAILROAD COMPANY, Appellant, v.
THE BUFFALO STREET RAILROAD COMPANY, Respondent.

The authority of the legislature in the exercise of its police powers cannot be limited or controlled by the action of a previous legislature, or by the provisions of contracts between individuals or corporations.

The parties hereto, two street railroad corporations in the city of B., entered into a contract providing, among other things, for the making by each of connections with the roads of the other "so long as it receives for the transportation of passengers the fare allowed on the 3d of May, 1872, and no longer," and each agreed that it would charge the same rate that it was "permitted to charge by the statutes in force regulating the same" on that day, and would make no change in rates without the consent of the other party. After the making of the contract it was declared by statute (Chap. 800, Laws of 1875), to be unlawful for any street railroad company in B. to charge more than five cents for each passenger, a sum less than that authorized by the statutes in force May 8, 1872. Defendant thereupon reduced its rates of fare to five cents. In an action to recover a penalty fixed by the contract for a breach of the provision as to rates of fare, *held*, that said provision contemplated a change of rates made by the voluntary action of the parties alone, not one made by paramount authority; also that by the terms of the contract it was to terminate in case a condition of affairs should arise under which the parties would not be permitted to charge the rates of fare specified; and so, that it terminated on the passage of the said act.

Also, *held*, that said act was not obnoxious to the constitutional prohibition against passing a law impairing the obligation of contracts.

(Argued June 15, 1888; decided November 27, 1888.)

APPEAL from judgment of the General Term of the Superior Court of the city of Buffalo, entered upon an order made

Statement of case.

January 20, 1876, which sustained a demurrer to plaintiff's complaint.

The nature of the action and the facts alleged in the complaint are substantially set forth in the opinion.

James C. Carter and *E. C. Sprague* for appellant. The legislature has power to act upon the subject of railway fares; nothing but a binding contract can preclude such action. (*Chicago, B. & Q. R. R. Co. v. Iowa*, 94 U. S. 155.) A contract, whether between natural persons or corporate bodies, valid at the time it was made, continues valid and binding, notwithstanding any state legislation, until its full performance. (*Stone v. Mississippi*, 101 U. S. 814.) The death of a corporate body has no more effect upon the obligation of its contracts than the death of a natural person has upon that of his contracts. (*Mumma v. Potomac Cö.*, 8 Pet. 281.) When a corporation is created it has the same rights, and the same duties, within the scope marked out for its action, that a natural person has. Its property is secured to it by the same constitutional guarantees, and its contracts are just as obligatory and inviolable as in the case of natural persons. (1 Morawetz on Corporations, §§ 1-8; *C. R. R. Co. v. Iowa*, 94 U. S. 155, 161; *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518.) There is no difference, so far as the principle in question is concerned, between contracts between individuals, and those to which the state is a party. (3 Hamilton's Works [Lodge's ed.], 29; Angell & Ames on Corp. § 767; U. S. Con. art. 1, § 10; *Seibert v. Lewis*, 122 U. S. 284.) The powers of a corporation, in the proper sense of that word, are held under the control of the legislature, but its acts, valid when done, are beyond its reach. It may indicate what contracts a corporate body may in the future make, but it cannot absolve them from the obligation to perform contracts already made. (*Sinking Fund Cases*, 99 U. S. 700.) The reservation of legislative authority over corporate bodies is limited to the contract between the state and the corporation, and does not touch any

Statement of case.

contract made between the corporate body and third persons. (*Tomlinson v. Jessup*, 15 Wall. 454; *Spring Valley Waterworks v. Schottler*, 110 U. S. 387.) A legislature cannot by any action under the reserved power take away any property or right, or affect any obligation, acquired or assumed by a legitimate exercise of the powers granted to a corporate body. (*Sage v. Villard*, 15 B. Mon. 340; *Comm. v. Essex Co.*, 13 Gray, 239; *Old Town R. R. Co. v. Veazie*, 39 Me. 571; *Blake v. P. & C. R. R. Co.*, 39 N. H. 435; *Holyoke Co. v. Lyman*, 15 Wall. 500; *New Jersey v. Yard*, 95 U. S. 104.) The obligation of a contract begins at its date, depends on the laws in existence when it was made, and continues until the debt is paid, or the acts agreed to be done performed. (*Blair v. Williams*, 4 Littell, 34; *Robinson v. Duncan*, 3 Mart. 531; *Western Soc. Lan. Fund v. Philadelphia*, 31 Pa. St. 175; *Wood v. Wood*, 14 Rich. 148; *Smith v. Cleveland*, 17 Wis. 556; *Bartey v. Gentry*, 1 Mo. 164; *Forsyth v. Marbury*, 1 R. M. Charl. 234; *Edwards v. Kearney*, 96 U. S. 595; *Fiske v. Police Jury of Jefferson*, 6 U. S. Sup. Ct. Rep. 329 n.) The companies are private corporations, although existing for public uses, and contracts made by them with their creditors, with each other, or by the state with them, are as inviolable as if they were private individuals. (*Trustees of Dartmouth College v. Woodward*, 4 Wheat. 526, 566; *Charles River Bridge v. Warren Bridge*, 11 Peters, 420; *Whiting v. Sheyboygan, etc., R. R. Co.*, 25 Wis. 137; *Attorney-General v. C. & N. W. R. Co.*, 35 id. 425; *People v. Batchellor*, 53 N. Y. 128.) The act of May 3, 1872, was, in legal effect, an express and inviolable contract between the state of New York and the companies, by which, for a valuable consideration, the state agreed with them that, during their corporate existence, they should have the right to charge the rates of fares which they were permitted to charge on that day, unless changed by their mutual consent, and the act of June 18, 1875, is unconstitutional, because it impaired that contract. (*Trustees of Dartmouth College v. Woodworth*, 4 Wheat. 518, 537, 538;

Statement of case.

Jefferson Branch Bank v. Skelly, 1 Black, 436; *Comm. v. N. B. Bridge Co.*, 2 Gray, 339; *Comm. v. Essex Co.*, 13 id. 239; *Humphreys v. Pegnes*, 16 Wall. 244; *Binghamton Bridge Case*, 3 id. 51; *W. R. R. Co. v. Reed*, 13 id. 264; *Fletcher v. Peck*, 6 Cranch, 87; *Chenango Bridge Co. v. Binghamton Bridge Co.*, 30 How. Pr. 346; *Beekman v. S. & S. R. R. Co.*, 3 Paige, 75.) The validity of the act of June 18, 1875, is not preserved by the reservations of legislative control over corporations contained in the state Constitution and the Revised Statutes, and those reservations afford no defense to the defendant in this action. (2 R. S. [5th ed.] part 1, tit. 3, chap. 18, § 8, p. 597; *White v. S. & U. R. R. Co.*, 31 Barb. 561; *Hyatt v. McMahon*, 25 id. 468; *B. & N. Y. C. R. R. Co. v. Dudley*, 14 N. Y. 348; *Poughkeepsie, etc., Plank-road Co. v. Griffin*, 24 id. 150; *Pumpelly v. Green Bay Co.*, 13 Wall. 166; *Miller v. N. Y. & E. R. R. Co.*, 21 Barb. 513; *Atty-Genl. v. C. & N. W. R. R. Co.*, 35 Wis. 579; *Miller v. State*, 15 Wall. 478; *Dodge v. Woolsey*, 18 How. 331; *Holyoke Co. v. Lyman*, 15 Wall. 500; *Penn. College Cases*, 13 id. 190, 205; *Conant v. Van Schaick*, 24 Barb. 87; *Story v. Furman*, 25 N. Y. 214; *People v. Comm., etc.*, 47 id. 501; *Home of Friendless v. Rouse*, 8 Wall. 430; *Benson v. Mayor, etc.*, 10 Barb. 223; Cooley on Const. Lim. [3d ed.] 126; *Bloomer v. Stolley*, 5 McLean, 161; *Comm. v. Essex Co.*, 13 Gray, 239; *Dufee v. O. C. R. R. Co.*, 3 Allen, 230; *Allen v. McKeen*, 1 Sumn. 299; 6 Mich. 193; *Erwin's Appeal*, 16 Penn. St. 256; *State v. Noyes*, 47 Me. 189; *Ins. Co. v. Morse*, 20 Wall. 445.) The term "due process of law" does not include a Constitution — a statute of state. (*Wynehamer v. People*, 13 N. Y. 392; 2 Kent's Com. 13; *Taylor v. Porter*, 4 Hill, 145; *Mumma v. Potomac Co.*, 8 Pet. 281; *Bacon v. Robertson*, 18 How. 480, 486; *People v. A., etc., R. R. Co.*, 24 N. Y. 26.) To destroy the ability of a party to perform his contract, is to impair its obligation within the meaning of the Constitution. (*Pumpelly v. Green Bay Co.*, 13 Wall. 166; *Parker v. Met. R. R. Co.*, 109 Mass. 506; *Thornton v. Mar. Freight R. R. Co.*, 123 id. 32, 34; *Coast Line R. R. Co. v. City of Savan-*

Statement of case.

nah, 32 Fed. Rep. 646; *Morris v. Essex, etc., R. R. Co.*, 7 At. Rep. 826; *St. Gan. W. W. Co. v. N. O. W. W. Co.*, 120 U. S. 64; *C. W. W. Co. v. B. H. Co.*, 10 At. Rep. 170; *Shields v. Ohio*, 96 U. S. 524; *O. T. R. R. Co. v. Veazie*, 39 Me. 570, 580, 581; *Sinking Fund Cases*, 99 U. S. 700, 721, 740-742, 748, 749, 757, 758; *N. O. Gas, Water and Bridge Cases*, 115 id. 650, 660, 672, 674; *Louisville Gas Co. v. Cit. Gas Co.*, Id. 683; *Brooklyn Park Comrs. v. Armstrong*, 45 N. Y. 234; Morawetz on Pri. Corp. §§ 473, 474, 478.) The reservation of legislative control over the corporate power of the defendant acts only upon the relations between the state and corporation, and not upon what is done between the corporation and those with whom it deals. (*N. O. Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; *R. R. Comrs. Cases*, 116 id. 307, 329; *Tomlinson v. Jessup*, 15 Wall. 459; *O. T. R. R. Co. v. Veazie*, 39 Me. 571, 580, 581; Morawetz on Corp. § 1102; *Sinking Fund Cases*, 99 U. S. 721, 748, 749, 757; *Miller v. State*, 15 Wall. 499; *Chicago v. Sheldon*, 9 id. 50, 55; *Coast Line R. R. Co. v. Mayor, etc.*, 30 Fed. Rep. 646, 650, 652.)

Sherman S. Rogers for respondent. The act of June, 1875, reducing the rates upon the roads of the respective parties was constitutional and valid. (Constitution, art. 8, § 1; 1 R. L. 600, § 8.) It is too late to question the power of the legislature to diminish fares to be charged by a railroad company, incorporated under the laws of this state. (*In re O. Lee & Co.'s Bk.*, 21 N. Y. 9; *In re Reciprocity Bk.*, 22 id. 11; *People ex rel. Kimball v. B. & A. R. R. Co.*, 70 id. 569; *Sheilds v. Ohio*, 95 U. S. 319; *Greenwood v. Freight Co.*, 105 id. 13, 21; *Mumma v. Potomac Co.*, 8 Peters, 281.) When the plaintiff took defendant's promise not to change its fares, it did so knowing that the franchise to change any fare, nay, even its franchise to exist, was within the control of the legislature, and that no one legislature could take away this power, directly or indirectly, from its successor and impliedly consented that this should be so, and the subsequent legislative action, therefore, in no manner impaired the obligation of the

Opinion of the Court, per RUGER, Ch. J.

contract which had been made with it. (*People v. Globe Mut. L. Ins. Co.*, 91 N. Y. 174, 179; *Peck v. C. R. R. Co.*, 94 U. S. 164.)

RUGER, Ch. J. The plaintiff and defendant are respectively incorporated street railroad companies, located in the city of Buffalo, and the action was brought upon a contract to recover a sum stipulated to be paid, as liquidated damages, upon a breach thereof by either party, that should reduce its rates of fare below the prices authorized to be charged under the statutes in force on May 3, 1872, each party thereby agreeing to make no change therein, without the consent of the other. This contract was claimed to have been made by authority of chapter 474 of the Laws of 1872.

Subsequent to this contract the legislature, by chapter 600 of the Laws of 1875, enacted, in substance, that it should be unlawful for any street railroad company in Buffalo to charge more than five cents for each passenger carried on their respective roads, without regard to the distance traveled. This price was considerably less than the amount authorized to be charged by the former statute.

Immediately thereafter the defendant reduced its rates of fare to the price authorized by the act of 1875, and this reduction constitutes the breach of the contract, relied upon for a recovery.

No question is made but that if the act of 1875 was a valid enactment, the defendant was required to conform to it, and would have a good defense to the action. It is, however, claimed by the plaintiff that the act was unconstitutional and void, inasmuch as it impaired the obligation of contracts. The only contract claimed to have been impaired is the one sued upon.

Among the defenses made to the action, is the claim that the agreement had terminated before the alleged breach by virtue of its own limitation, and it is also urged that a reasonable construction of the language of the agreement shows that

its obligations were not intended to survive, any statutory reduction of the rates of fare chargeable upon such railroads.

There is no express provision in the contract providing for the period of its duration, but there are several, which furnish strong grounds for the inference that the parties did not intend that it should continue, after an unfavorable change in the rates of fare. Among these provisions it is only necessary to refer to one, providing that, "the said party of the first part so long as it receives for the transportation of passengers the fare allowed by law on the 3d day of May, 1872, *and no longer*," will make connections with roads to be built by the party of the second part, and run a sufficient number of cars to accommodate all passengers applying for transportation, etc.; and another contained in the fifth paragraph which provides that the party of the first part agrees that it will, during the continuance of the contract, charge the same rates for the transportation of passengers over its railroads, or any part thereof, that it is "*permitted to charge* by the statutes in force regulating the same on the 3d day of May, 1872, and that it will not make any change in such rates without the consent of the party of the second part."

Similar provisions were contained in the contract relating to the obligations of the party of the second part, and contemplating the termination of the contract upon the same contingency.

It is quite clear that the parties had in view a condition of affairs under which they would not be *permitted* to charge and receive the rates of fare authorized by former acts, and in that event expressly provided for the termination of the contract.

But the plaintiff contends that the rates authorized on May 3, 1872, still continue, so far as these two companies are concerned, by force of the obligations of their contract, and the constitutional inhibition upon the state from passing any law impairing its effect.

We are not impressed with the soundness of this contention. It was competent for the parties to agree upon any

period as the duration of their contract, and they might, if they chose to do so, provide that it should cease upon the passage of even an unconstitutional law.

It is difficult to explain what is meant by the expression that the contract should continue so long as the companies received and were *permitted* to charge the rates authorized on May 3, 1872, and no longer, if there was no constitutional power to effect such change. Settled rules of construction require us to give some meaning and effect to all of the language employed in the contract, provided it can be done without doing violence to the plain object and intent of the parties in making their agreement.

It is quite clear that the parties assumed the existence of the power of the legislature to change the rates, and contracted with reference to such a contingency. A fair and reasonable construction of the contract would seem to be that the parties intended any change to be effected by the voluntary action of the parties, and not one made in obedience to paramount authority. It would be unreasonable to say that either party intended to run the hazard and danger of disobedience to a statute of the state, and there is nothing, we think, in the contract which required it to do so.

Every exercise of legislative power is presumed to be constitutional, and it cannot, without the clearest language indicating such an intention, be supposed that parties anticipated the enactment of an unconstitutional law, or contracted upon such an assumption.

We are, therefore, of the opinion that the contract, so far as this provision was concerned, had terminated by force of its own limitation when the act of 1875 was enacted. Construed in this way, the legislation of 1873, incidentally referring to this contract and providing that its validity should not be affected thereby, is intelligible, and perhaps sustainable, but upon any other theory it is difficult to see its object or design. We cannot ascribe to the legislature an intention by that act, to hamper and restrain its successors in the exercise of legitimate constitutional power over the subject of railroad fares

Opinion of the Court, per RUGER, Ch. J.

(*Railroad Commission Case*, 116 U. S. 307), and if it was an effort to pass upon the validity of the contract, that subject was a judicial one and beyond the province of legislative authority to act upon.

But we are further of the opinion that the act of 1875 was a valid exercise of legislative power, and did not impair the obligations of any contract, within the meaning of the constitutional provision.

The inability of one legislature to limit or control the legislative action of its successors is a familiar principle which needs no citation to support it. (*Pres. Church v. City of New York*, 5 Cow. 538.)

The same authority which confers upon one body the power of legislation authorizes its successors, in the exercise of their duty, to change, alter and annul existing laws when, in their judgment, the public interest requires it. In the performance of their duty of legislating for the public welfare, each successive body must, from necessity, be left untrammelled except by the restraints of the fundamental law, and when called upon to act upon subjects which concern the health, morals or interests of the people, as affected by a public use of property for which compensation is exacted by its owners, they are unlimited by constitutional restraint. It is unnecessary to discuss this proposition with much fullness as it was conceded by the appellant upon the argument, and is repeated in its printed brief, that the authority of the legislature in the exercise of its police powers could not be limited or restricted by the provisions of contracts between individuals or corporations. *Pacta privata publico juri derogare non possunt.*

This proposition is also abundantly established by authority. (*Pres. Church v. City of New York*, *supra*; *Coats v. Mayor*, *etc.*, 7 Cow. 5-5; *Vanderbilt v. Adams*, Id. 349; *Mayor, etc. v. Second Ave. R. R. Co.*, 32 N. Y. 261; *People v. B. & A. R. R. Co.*, 70 id. 569; *Stone v. Farmers' L. & T. Co.*, 116 U. S. 307; *Barbier v. Connolly*, 113 id. 27.)

It was said in *People v. Boston and Albany Railroad Company* (*supra*), that "railroad corporations hold their

Opinion of the Court, per RUGER, Ch. J.

property and exercise their functions for the public benefit, and they are therefore subject to legislative control. The legislature which has created them may regulate the mode in which they shall transact their business, the price which they shall charge for the transportation of freight and passengers, etc. * * * It may make all such regulations as are appropriate to protect the lives of persons carried upon railroads or passing upon highways crossed by railroads. All this is within the domain of legislative power, although the power to alter and amend the charters of such corporations has not been reserved. * * * Such legislation violates no contract, takes away no property, and interferes with no vested right."

In *Munn v. Illinois* (94 U. S. 124), Chief Justice WAITE, in speaking of the implied powers which social organization confers upon its government over the conduct and property of members, says that "it does authorize the establishment of laws requiring each citizen to so conduct himself and so use his own property as not necessarily to injure another. This is the very essence of government, and has found expression in the maxim *sic utero tuo ut alienum non laedas*. From this source came the police powers, which, as was said by Mr. Chief Justice TANEY in the *License Case* (5 How. 583), 'are nothing more or less than the powers of government inherent in every sovereignty, * * * that is to say * * * the power to govern men and things.' Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold."

Judge BRADLEY, in the *Sinking Fund Cases* (99 U. S. 747), referring to the *Munn* case, says: "The inquiry there was as

Opinion of the Court, per RUGER, Ch. J.

to the extent of the police power in cases where the public interest is affected; and we held that when an employment or business becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community, it is subject to regulation by the legislative power."

We think it unnecessary to discuss the question as to how far the legislature were authorized to go in regulating the affairs of corporations under the power of amendment and repeal imposed by the Revised and other statutes. (R. S. [7th ed.] § 8, tit. 3, chap. 18, part 1, p. 1531.)

It seems to be conceded by all of the authorities that such reservations confer upon them power to regulate, to a certain extent, the general management and control of the internal affairs of such corporations, but the grounds already referred to are sufficient to dispose of the case without considering questions not essential to that end.

We think the authorities cited are decisive of the question, and lead to an affirmance of the judgment.

The judgment of the court below should, therefore, be affirmed.

All concur, EARL and GRAY, JJ., in the result.

Judgment affirmed.

Statement of case.

WILLIAM J. BYAM, Appellant, v. JENNIE E. COLLINS et al.,
Respondents.

111	148
123	438

111	148
138	528

111	148
147	636

In an action for libel and slander it appeared that plaintiff was on terms of social intimacy with D. and was paying her attention with a view to matrimony. Defendant J., in April, 1879, wrote to D. a letter containing charges against plaintiff, which was the libelous publication complained of. Up to the January before the writing of the letter J. and D. had been very intimate friends; then they became somewhat estranged and their intimacy ceased. During the intimacy, and about four years before the writing of the letter, D. repeatedly requested J. "if she knew anything about any young man she went with, or in fact any young man in the place, to tell her." D. was not then contemplating marriage with any young man, and did not know the plaintiff. The letter referred to the former friendship, to the estrangement, and stated substantially that D. was still very dear to the writer, and for this reason she felt that she must interfere. J., as a witness, testified that when she wrote the letter she thought as much of D. as if she belonged to her family; that she had heard the defamatory rumors and believing them, did not wish her to marry the plaintiff. *Held* (DANFORTH, J., dissenting), that while J. could properly tell what she knew about young men, she was not justified in defaming them even upon request by telling what she did not know and what was not true, although her defamatory statements were based upon rumors and hearsay which she believed to be true; and that, therefore, the letter was not a privileged communication; also, that the evidence failed to show that the letter was written in pursuance of a request made so long before; on the contrary, it appeared from the circumstances and from the letter itself that D. did not at the time desire any information from J., and that this was known to the latter.

It seems that if J. had been asked by D. for information as to plaintiff's character and standing, she could properly have given any information she possessed, provided she acted in good faith and without malice.

As privileged communications are exceptions to the general rule which implies malice in a libelous publication and infers some damage, it rests with the party claiming the privilege to show that the case is brought within the exception.

The exception covers cases where a communication is made *bona fide* upon any subject-matter in which the party making it has an interest, or in reference to which he has a duty, legal, moral or social, which may fairly be presumed to have led to the communication, when made to a person having a corresponding interest or duty.

The claim of a moral duty will not be sustained when a person as a volunteer has made defamatory statements against another in a matter in which he has no legal duty or personal interest, unless he can find a justification in some pressing emergency.

Statement of case.

As to whether a libelous publication is privileged is a matter of law (DANFORTH, J., dissenting), and *it seems* that when, upon the trial of an action for libel, it has been held as matter of law that the publication was privileged, the burden rests upon the plaintiff to establish that it was maliciously made, this is a question of fact to be determined by the jury. *Todd v. Hawkins* (8 C. & P. 88) distinguished.

When not privileged the law implies malice in the case of oral as well as written defamation.

As to the slanderous words charged, J. testified that she uttered them to one C. in confidence, after the most urgent solicitations on his part that she should tell what she knew about plaintiff. The court charged that the words so uttered were privileged. *Held*, error.

It seems that even had it appeared that C. had the interview with J. at the solicitation of plaintiff and as his friend, this would not make the slanderous words uttered in the interview privileged.

Defamatory words are not privileged simply because uttered in the strictest confidence by one friend to another, nor because uttered upon the most urgent solicitations.

Byam v. Collins (39 Hun, 204) reversed.

(Argued June 22, 1888; decided November 27, 1888.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made the first Tuesday of January, 1886, which affirmed a judgment in favor of defendants entered upon a verdict and denied a motion for a new trial. (Reported below, 39 Hun, 204.)

This was an action for libel and slander.

The defendants are husband and wife. Mr. Collins is sued by reason of that relationship only. The charge of libel is based upon a letter written by Mrs. Collins to one Dora McNaughton in these words :

“ CALEDONIA, April 11, 1879.

“ MY DEAR DORA :

“ For a long time I have been earnestly solicited by your friends and mine to warn you in some way of the danger you are in, in the company you keep at present. I have refrained from doing so for various reasons, the principal one being the fact that I was very rudely treated by you one day at Mrs. Grant's when I was there for the purpose of doing you

Statement of case.

a favor which you have never acknowledged to this day, although you have availed yourself of my friend's kindness.

"You have, also, given up coming to my house, for what reason I do not know, for I have never injured you or yours in thought, word or deed.

"But to return to the subject. Since the exhibition of last Wednesday I have decided to hold my peace no longer, feeling that if I do and your life is wrecked (as it is sure to be if you marry or have further acquaintance with that man) that I shall in some way be responsible for it, inasmuch as I neglect to do my duty. And, oh, Dora! be warned by me before it is too late, have nothing to do with him for the sake of the friendship we once had and which was very dear to me. Oh! Dora, I have loved you as a sister and I cannot see you degraded and your name becoming a by-word in the mouth of every rowdy in town. Can you thus lightly set aside a tried and true friend of years for the sake of an adventurer of a few weeks acquaintance? I have thought that ere this your usual good sense would come to your rescue, but the mystery seems to grow deeper and deeper.

"There are persons in this town who, at present, profess great friendship for you who, I feel certain, are leading you on only that they may glory over your humiliation, which must come sooner or later, for you cannot handle fire and not be burned, and it is to save you from that I make this appeal to you. I have every reason for believing that both my husband and myself have been lied about and misrepresented to you, but have you been honest in listening to a stranger and taking his word and believing it without further proof?

"Is it possible that you know the character of that man? I know that if you did you would spurn him from your house and presence forever, and if you will but give me the opportunity of a personal interview with yourself, I will tell you a few truths, and, as no one need fear the truth, that will open your eyes and, perhaps, save you from a life-long sorrow and regret.

Statement of case.

“Do not deny me this favor for you are still very dear to me, and I feel that I must interfere in your behalf as no one else has dared to do it. I close with my love to you, hoping that our Heavenly Father may keep you from all harm, and show you the right way out of these difficulties.

“I remain, as ever, your true friend,

“JENNIE E. COLLINS.”

The answer admits the writing and publication by sending the letter to Dora ; denies that it was prompted by malice or ill feeling ; declares that the writing was founded upon information, which she believed, and claims that the communication was privileged by reason of her friendly relations with Dora.

The charges of slander are, so far as material, contained in the second count of the complaint, and are as follows :

“The said plaintiff further says, upon information and belief, that on or about the 15th day of April, 1879, at Caledonia aforesaid, the said defendant, Jane E. Collins, in the presence and hearing of Dugald E. Cameron, of Caledonia aforesaid, and of divers other good and reputable citizens of the state of New York, wrongfully, maliciously and with intent to cause it to be believed that the said plaintiff was a person unfit and unworthy to be associated with, and was unfit and unworthy to be consulted professionally as an attorney and counselor or to be trusted in his profession and business, then and there spoke of and concerning the said plaintiff and of and concerning his said profession and business, the false and defamatory words following, to wit : ‘He’ (the said plaintiff meaning), ‘is a bad man and ought to be driven out of the place and is not fit to associate with decent people.’ ‘He’ (the said plaintiff meaning), ‘insulted a young lady in Geneseo by going into her room, and she drew a revolver on him and he had to get down on his knees and beg of her to let him off.’ ‘He’ (the said plaintiff meaning), ‘also went to Canada in company with a woman in private.’ ‘He’ (the said plaintiff meaning), ‘is also guilty of dishonest practices as a lawyer and is not to be trusted.’ ‘He’ (the said plaintiff meaning), ‘is

Statement of case.

altogether void of principle both as a man and in his business.' Whereby and by reason of all which false and defamatory words in the premises in the second cause of action set forth a number of persons and, in particular, Robert Espie, Willis Remington, Robert J. Menzie and Daniel McNaughton, who had theretofore been accustomed to deal with and employ the plaintiff in his business aforesaid, ceased to deal with him, and the plaintiff was thereby deprived of their custom and patronage and of the profits he would otherwise have realized by such custom and patronage, and was otherwise greatly damaged and injured in his professional business and reputation."

The answer to the said count is as follows :

" And for answer to the alleged cause of action as stated in the second count or cause of action in the said plaintiff's complaint contained, the said defendant, Jennie E. Collins, says that on or about the time stated in said count the said Dugald E. Cameron, an influential and leading citizen of Caledonia, sought and procured an interview with the said defendant for the purpose as he stated, of amicably arranging the difficulty between the said defendant and said plaintiff; that the said Cameron requested the said defendant to state what she knew or had heard about the said plaintiff; that said Cameron stated that he was the friend of said defendant and wanted her to talk to him as her friend; that, in reply to inquiries by said Cameron, the said defendant stated to him what she had heard of and concerning said plaintiff; that she expressly said, that she knew nothing about the said plaintiff, except from hearsay, and she stated to said Cameron, in substance and effect, that she had heard that he insulted a lady in Geneseo, by going into her room, and that she drew a revolver on him, said plaintiff, and he had to get down on his knees and beg of her to let him off; that the said defendant also said that she heard that the said plaintiff went to Canada in company with a woman privately; and she further stated, in substance and effect, that she had been told that said plaintiff was guilty of dishonest practices as a lawyer; and the said defendant then and there said to said Cameron, in substance, that if what she

Statement of case.

had heard said of the said plaintiff was true, he was devoid of principle both as a man and a lawyer; that he was a bad man and unworthy to live in the place; that the foregoing conversation was had with the said Cameron, on his assurance of friendship, and that what she said should not be used to her disadvantage; that the said defendant believed the assurances of the said Cameron; that the interview with and the statements and communications made to said Cameron were made in strict confidence, relying on the professed friendship of the said Cameron; that the same and the whole thereof was a confidential communication and was made without malice and without any intent to injure said plaintiff. And the said defendant says that she verily believed the statements she made to said Cameron of and concerning the said plaintiff to be true. And the said defendant denies any knowledge or information sufficient to form a belief of the allegations contained in the said second count or cause of action, except as hereinabove admitted."

The facts, so far as material, are set forth in the opinion.

A. J. Abbott for appellant. The court erred in excluding testimony of plaintiff as to the decline of his business in consequence of the slanders which were largely spoken against him in his professional character as a lawyer. (*Bergmann v. Jones*, 94 N. Y. 51.) It is the province and duty of the court to decide whether the occasion was such as to have constituted the communication a privileged one, and it is within the province of the jury to find whether such privileged occasion has been abused. (*Hamilton v. Eno*, 81 N. Y. 122, 124.) As a general rule, there can be no privilege in a third person's interference between man and woman in their negotiations for marriage to prevent the same. (Cooley on Torts, 215n.; Townshend on Slander and Libel [3d ed.] 450; *Joannes v. Bennet*, 5 Allen, 170.) To constitute a justification, the absolute truth of the defamatory matter should be alleged. It is not sufficient to set up facts which only tend to establish the truth of such matter. (Townshend on Slander

Statement of case.

and Libel, § 357 and note, and § 355, note 1; 51 Barb. 483.) The truth must be established with as much certainty as would be necessary to convict under an indictment for the same offense. (Townshend on Slander and Libel, §§ 357, 404; Abb. Trial Ev. 670, note 15.) If a material part of the justification fails, then all fail. (Townshend on Slander and Libel, §§ 359, 408.) The truth of the matter charged, to constitute a justification, must be made out beyond a reasonable doubt. The reasonable belief of the defamer has nothing to do with it as far as a justification is concerned. (Townshend on Slander and Libel, § 404; Abb. Trial Ev. 670, note 15; 6 Cow. 118; 16 Wend. 601; 3 Barb. 602.) Rumor is not available under the plea of mitigation. (Townshend on Slander and Libel, § 411; 1 Wend. 451; 5 Cow. 499.) Facts available in mitigation must be shown to be facts. (81 N. Y. 249.) Charging an attorney at law with dishonesty in his practice and profession is actionable, *per se*. (Sedg. on Damages, 673; Townshend on Slander and Libel, §§ 192, 198, 370.) When the language is actionable *per se* special damages need not be alleged. (Townshend on Slander and Libel, § 345.)

James Wood for respondents. A communication is privileged, within the rule, when made in good faith to one having an interest in the information sought, and it will be privileged, if volunteered, when the party to whom the communication is made has an interest in it, and the party by whom it is made stands in such a relation to him as to make it a reasonable duty, or, at least, proper that he should give the information. (*Sunderlin v. Bradstreet*, 46 N. Y. 188; *Lewis v. Herrick*, 16 id. 128, 369; 1 Starkie on Slander, 321; *Klinck v. Colby*, 46 N. Y. 427, 433.) This rule holds good, even though the imputations contained in the communication were false, based upon erroneous information. (*Kine v. Small*, 1 H. & H. 83; *S. C.*, 3 M. & W. 297; *Streely v. Wood*, 15 Barb. 105, 111; *Hastings v. Lech*, 22 Wend. 410; *Fowler v. Bowen*, 30 N. Y. 20; *Moak's Underhill on Torts*, 46; 23 Alb. L. Jour. 415; *Marks v. Baker*, 12 Rep. 530; Townshend on Slander and

Opinion of the Court, per EARL, J.

Libel, §§ 209-241; *Joannes v. Bennet*, 5 Allen, 109; *Resbolam v. Campbell*, 5 Jur. [N. S.] 243; *Krebs v. Olin*, 12 Gray, 239; *Atkinson v. Cogswell*, 7 Fr. L. R. [N. S.] 109.)

EARL, J. The general rule is that in the case of a libelous publication the law implies malice and infers some damage. What are called privileged communications are exceptions to this rule. Such communications are divided into several classes, with one only of which we are concerned in this case, and that is generally formulated thus: "A communication made *bona fide* upon any subject matter in which the party communicating has an *interest*, or in reference to which he has a *duty*, is privileged if made to a person having a corresponding *interest* or *duty*, although it contained criminating matter which, without this privilege, would be slanderous and actionable; and this though the duty be not a legal one, but only a moral or social duty of imperfect obligation." The rule was thus stated in *Harrison v. Bush* (5 Ellis & Black. [Q. B.] 344), and has been generally approved by judges and text writers since. In *Toogood v. Spyring* (1 Cr. M. & R., [Ex.] 181), an earlier case, it was said that the law considered a libelous "publication as malicious unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned"; and that statement of the rule was approved by FOLGER, J., in *Klench v. Colby* (46 N. Y. 427), and in *Hamilton v. Eno* (81 N. Y. 116). In *White v. Nicholls* (3 How. [U. S.] 266, 291), it was said that the description of cases recognized as privileged communications must be understood as exceptions to the general rule, and "as being founded upon some apparently recognized obligation or motive, legal, moral or social, which may fairly be presumed to have led to the publication, and, therefore, *prima facie* relieves it from that just implication from which the general law is deduced."

Whether within the rule as defined in these cases a libelous communication is privileged, is a question of law; and when

Opinion of the Court, per EARL J.

upon any trial it has been held as matter of law to be privileged, then the burden rests upon the plaintiff to establish as matter of fact that it was maliciously made, and this matter of fact is for the determination of the jury.

It has been found difficult to frame this rule in any language that will furnish a plain guide in all cases. It is easy enough to apply the rule in cases where both parties, the one making and the one receiving the communication, are interested in it, or where the parties are related, or where it is made upon request to a party who has an interest in receiving it, or where the party making it has an interest to subserve, or where the party making it is under a legal duty to make it. But when the privilege rests simply upon the moral duty to make the communication, there has been much uncertainty and difficulty in applying the rule. The difficulty is to determine what is meant by the term "moral duty," and whether in any given case there is such a duty. In *Whiteley v. Adams* (15 C. B. [N. S.] 392), ERLE, Ch. J., said: "Judges who have had, from time to time, to deal with questions as to whether the occasion justified the speaking or the writing of defamatory matter, have all felt great difficulty in defining what kind of social or moral duty, or what amount of interest will afford a justification;" and in the same case, BYLES, J., said the application of the rule "to particular cases has always been attended with the greatest difficulty; the combinations of circumstances are so infinitely various."

The rule as to privileged communications should not be so extended as to open wide the flood-gates of injurious gossip and defamation by which private character may be overwhelmed and irreparable mischief done, and yet it should be so administered as to give reasonable protection to those who make and receive communications in which they are interested, or in reference to which they have a real, not imaginary, duty. Every one owes a moral duty, not, as a volunteer in a matter in which he has no legal duty or personal interest, to defame another unless he can find a justification in some pressing emergency. In *Coxhead v. Richards* (2 Mann., G. & S.

Opinion of the Court, per EARL, J.

569, 602), COLTMAN, J., said: "The duty of not slandering your neighbor on insufficient grounds is so clear that a violation of that duty ought not to be sanctioned in the case of voluntary communications except under circumstances of great urgency and gravity. It may be said that it is very hard on a defendant to be subject to heavy damages when he has acted honestly and when nothing more can be imputed to him than an error in judgment. It may be hard, but it is very hard on the other hand to be falsely accused. It is to be borne in mind that people are but too apt rashly to think ill of others; the propensity to tale bearing and slander is so strong amongst mankind, and when suspicions are aroused, men are so apt to entertain them without due examination, in cases where their interests are concerned, that it is necessary to hold the rule strictly as to any officious intermeddling by which the character of others is affected;" and in the same case CRESSWELL, J., said: "If the property of the ship-owner on the one hand was at stake, the character of the captain was at stake on the other; and I cannot but think that the moral duty not to publish of the latter defamatory matter which he did not *know* to be true, was quite as strong as the duty to communicate to the ship-owner that which he *believed* to be true."

One may not go about in the community and, acting upon mere rumors, proclaim to everybody the supposed frailties or bad character of his neighbor, however firmly he may believe such rumors, and be convinced that he owes a social duty to give them currency that the victim of them may be avoided; and, ordinarily, one cannot with safety, however free he may be from actual malice, as a volunteer, pour the poison of such rumors into the ears of one who might be affected if the rumors were true. I cite a few cases by way of illustration. In *Godson v. Home* (1 B. & B. 7), one Noah solicited the plaintiff to be his attorney in an action. The defendant, apparently a total stranger, wrote to Noah to deprecate his so employing the plaintiff, and this was held to be clearly not a confidential or privileged communication. In *Storey v.*

Opinion of the Court, per EARL, J.

Challands (8 C. & P. 234), one Hersford was about to deal with the plaintiff when he met the defendant who said at once, without his opinion being asked at all, "if you have anything to do with Storey you will live to repent it, he is a most unprincipled man," etc., and Lord DENMAN directed a verdict for the plaintiff because the defendant began by making the statement without waiting to be asked. In *York v. Johnson* (116 Mass. 482), the defendant, a member of a church, was appointed with the plaintiff and other members of the church on a committee to prepare a Christmas festival for the Sunday school. He declined to serve, and being asked his reason by Mrs. Newton, a member of the committee, said that a third member of the committee, a married man, had the venereal disease, and being asked where he got it said he did not know, but that "he had been with the plaintiff," who was a woman, and it was held that this was not a privileged communication. There was no question of the defendant's good faith and reasonable grounds of belief in making the communication, and yet DEVENS, J., in the opinion said: "The ruling requested by the defendant that the communication made by him to Mrs. Newton was a privileged one and not actionable except with proof of express malice, was properly refused. There was no duty which he owed to Mrs. Newton that authorized him to inform her of the defamatory charges against the plaintiff, and no interest of his own which required protection justified it. He had declined to serve upon the same committee with Mrs. York; but he was under no obligation to give any reason therefor, however persistently called upon to do so; and even if Mrs. Newton had an interest in knowing the character of Mrs. York, as a member of the same church, it was an interest of the same description which every member of the community has in knowing the character of other members of the same community with whom they are necessarily brought in contact, and would not shield a person who uttered words otherwise slanderous."

Having thus stated the general principles of law applicable
SIOKELS — VOL. LXVI. 20

Opinion of the Court, per EARL, J.

to a case like this, I will now bring to mind the facts of this case so far as they pertain to the defamatory letter. The plaintiff was a lawyer and had been engaged in the practice of his profession at Caledonia for several months and resided there at the date of the letter. Miss Dora McNaughton and the defendant also resided there. The plaintiff was on terms of social intimacy with Dora and was paying her attention with a view to matrimony, and some time subsequently married her. Mrs. Collins was about twenty-five years old, two years and a half younger than Dora, and was married November 2, 1875; and prior to that she had always resided within a mile and a half from the residence of Dora and they had been very intimate friends. Dora had a father and no brother, and Mrs. Collins had a brother. During the time of this intimacy and at some time before the marriage of Mrs. Collins, Dora repeatedly requested of her that if she "knew anything about any young man she went with, or in fact any young man in the place, to tell her because her father did not go out a great deal and had no means of knowing, and people would not be apt to tell him," that she, Mrs. Collins, had a brother and would be more apt to hear what was said about young men, and Dora wished her to tell what she knew. Their intimacy continued after the marriage of Mrs. Collins until January before the letter was written, when a coldness sprang up between them. They became somewhat estranged and their intimacy ceased. Mrs. Collins testified that when she wrote the letter she thought just as much of Dora as if she had belonged to her family; that she had heard the defamatory rumors and believed them, and, therefore, did not wish her to marry the plaintiff. It must be observed that the request of Dora to Mrs. Collins for information about young men was not made when she was contemplating marriage to any young man, and that the request was not for information about any particular young man or about any young man in whom she had any interest; but it was for information about the young men generally with whom she associated. Nor literally construing the language, did Dora wish for informa-

Opinion of the Court, per EARL, J.

tion as to the gossip and rumors afloat about young men. What she asked for was such facts as Mrs. Collins *knew* and not for her opinion about young men or her estimation of them. But if we assume that the request was for information as to all the rumors about young men which came to the knowledge of Mrs. Collins, the case of the defendant is not improved. At that time the plaintiff was not within Dora's contemplation, as she did not know him until long after. The request was not for information as to any young man who might pay her attention with a view to matrimony; it was for information about all the young men in her circle. Mrs. Collins was not related to her and was under no duty to give the information, and Dora had no sufficient interest to receive the information. Mrs. Collins was under no greater duty to give the information to Dora than to any of the other young ladies of her acquaintance in the same circle. She could properly tell what she knew about young men, but could not defame them, even upon request, by telling what she did not know, what nobody knew, but what she believed upon mere rumors and hearsay to be true. The mere fact that she was requested or even urged to give the information, did not make the defamatory communication privileged. (*York v. Johnson, supra.*)

But there is no proof that this letter was written to Dora in pursuance of any request made by her four years before its date, and there was no evidence which authorized the jury to find so if they did so find. On the contrary, it is clear that Dora would not, at the time, have gone to Mrs. Collins for any information as to the plaintiff if she had desired any, and that she did not wish for the information from her; and that this was known to Mrs. Collins the language of the letter clearly shows. In the defendant's answer it is alleged that Mrs. Collins's letter was prompted by her friendship for Dora and by the solicitation of "mutual friends to interfere in the matter and break off the relations which seemed to exist between the plaintiff and Dora," and there is no averment that it was written in pursuance of any request coming from Dora. The letter itself as well as the evidence of Mrs. Collins

Opinion of the Court, per EARL, J.

shows unmistakably that it was thus prompted. Mrs. Collins did not testify that she wrote the letter in pursuance of any request of Dora, and the action was not tried upon that theory, and no question as to the request was submitted to the jury. The trial judge charged the jury broadly that if the relations of Dora and Mrs. Collins were of such an intimate character as to warrant the latter in warning the former "against a person whom she had reason to believe was not a fit person, and if Mrs. Collins acted fairly, in good faith, conscientiously, although mistakenly, there can be no recovery against her," upon the count in the complaint for libel; and then the court said: "Did Mrs. Collins in writing that letter act fairly, act judiciously, not in the matter of good taste, but did she with the facts which had been brought to her mind act in a conscientious and proper manner? If she did, if she acted as an ordinarily prudent person would act under the same circumstances, if she had probable ground for her belief, she was justified in writing the letter." Mrs. Collins then appears as a mere volunteer, writing the letter to break up relations which she feared might lead to the marriage of the plaintiff to Dora. If she had not been the mother of Dora, or other near relative, or if she had been asked by Dora for information as to the plaintiff's character and standing, she could with propriety have given any information she possessed affecting his character, provided she acted in good faith and without malice. But a mere volunteer having no duty to perform, no interest to subserve, interferes with the relations between two such people at her peril. The rules of law should not be so administered as to encourage such intermeddling, which may not only blast reputation but possibly wreck lives. In such a case the duty not to defame is more pressing than the duty to communicate mere defamatory rumors not known to be true.

Some loose expressions may doubtless be found in text books and judicial opinions supporting the contention of the defendant that this letter was, in some sense, a privileged communication. But, after a very careful research, I believe there

Opinion of the Court, per EARL, J

is absolutely no reported decision to that effect. The case which is as favorable to the defendant as any, if not more favorable than that of any other, is that of *Todd v. Hawkins* (8 Car. & P. 88). In that case, a widow being about to marry the plaintiff, the defendant, who had married her daughter, wrote her a letter containing imputations on the plaintiff's character, and advising a diligent and extensive inquiry into his character, and it was held that the letter was written on a justifiable occasion, and that the defendant was justified in writing it, provided the jury was satisfied that, in writing it, he acted *bona fide*, although the imputations contained in the letter were false or based upon the most erroneous information; and if he used expressions, however harsh, hasty or untrue, yet *bona fide*, and believing them to be true, he was justified in so doing. The letter was held privileged solely upon the ground of the near relationship existing between the widow and the defendant, her son-in-law, which justified his voluntary interference. But the judge expressly stated that if the widow and defendant had been strangers to each other, there would have been a mere question of damage. A case nearer in point is that of "*The Count Joannes*" v. *Bennett* (5 Allen, 169). There it was held that a letter to a woman containing libelous matter concerning her suitor, cannot be justified on the ground that the writer was her friend and former pastor, and that the letter was written at the request of her parents, who assented to all its contents. The decision was put upon the ground that, in writing the letter, the defendant had no interest of his own to serve or protect; that he was not in the exercise of any legal or moral duty; that the proposed marriage did not even involve any sacrifice of his feelings or injury to his affections, and did not, in any way, interfere with or disturb his personal or social relations; that the person to whom the letter was addressed was not connected with him by the ties of consanguinity or kindred, and that he had no peculiar interest in her. Some years before the same learned court decided the case of *Krebs v. Oliver* (12 Gray, 239), wherein it was held that statements that a man has been

Opinion of the Court, per EARL, J.

imprisoned for larceny, made to the family of a woman whom he is about to marry, by one who is no relation of either, and not in answer to an inquiry, are not privileged communications. In the opinion, it is said : " A mere friendly acquaintance or regard does not impose a duty of communicating charges of a defamatory character concerning a third person, although they may be told to one who has a strong interest in knowing them. The duty of refraining from the utterance of slanderous words, without knowing or ascertaining their truth, far outweighs any claim of mere friendship."

I am, therefore, of opinion that the letter was in no sense, upon the facts as they appear in the record, a privileged communication.

There was, also, error in the court below as to the verbal slanders alleged in the second cause of action ; and what I have already said applies, in part, to these slanders. There was no substantial denial of these slanders in the answer, and there is no dispute in the evidence that they were uttered, and there can be no claim upon the evidence that they were justified. The trial judge charged the jury that the words were slanderous. But he said to them that " there is not that presumption of malice in the case of oral slanders that there is in the case of a deliberate writing." This was excepted to by plaintiff's counsel, and was clearly erroneous. In the case of oral defamation, as in the case of written, if the words uttered were not privileged, the law implies malice.

The judge further charged the jury, in substance, that the words, if uttered under the circumstances testified to by Mrs. Collins, were privileged. She testified, in substance, that she uttered the words to Mr. Cameron in confidence, after the most urgent solicitation on his part that she should tell him what she knew about the plaintiff. But defamatory words do not become privileged merely because uttered in the strictest confidence by one friend to another, nor because uttered upon the most urgent solicitation. She was under no duty to utter them to him, and she had no interest to subserve by uttering them. He had no interest or duty to hear the

Dissenting opinion, per DANFORTH, J.

defamatory words, and had no right to demand that he might hear them; and under such circumstances there is no authority holding that any privilege attaches to such communications.

There was no evidence that would authorize a jury to find that Cameron sought the interview with Mrs. Collins, as an emissary from or agent of the plaintiff, or that at the plaintiff's solicitation or instigation he obtained the slanderous communications from her, and he did not profess or assume to act for him on that occasion. He was the mutual friend of the parties, and seems to have sought the interview with her either to gratify his curiosity, or to prevent the impending litigation between the parties. But even if he obtained the interview with her at the solicitation of the plaintiff, and as his friend, she could not claim that her slanderous words uttered at such interview were privileged.

The trial judge, therefore, erred in refusing to charge the jury that there was no question for them as to the second cause of action but one of damages.

Therefore, without noticing other exceptions to rulings upon the trial, for the fundamental errors herein pointed out, the judgment should be reversed and a new trial granted.

DANFORTH, J. (dissenting). The plaintiff united in his complaint two causes of action for slander with two causes of action for libel, and a fifth cause of action reiterating, by general reference, the allegations of the preceding ones, and charging the report and publishing thereof "to divers other persons." No attention seems to have been given to this cause of action at any time during the trial, and before the plaintiff rested his counsel stated that there was a failure of proof as to the third cause of action, and it was abandoned. Nor, upon this appeal, is any point made by the learned counsel for the appellant as to the first count, and our attention is directed by him only to the disposition made by the trial judge of the questions arising on the second and fourth causes of action.

The defendant, Mrs. Collins, testified that Dora told her "repeatedly, that if I knew anything about any young man

Dissenting opinion, per DANFORTH, J.

she went with, or, in fact, any young man in the place, to tell her, because her father didn't go out a great deal, and had no means of knowing, and people wouldn't be apt to tell him; that I had a brother and I would be more apt to hear it and she wished me to tell her what I knew."

She heard Byam talked about a great deal, but no one spoke well of him, and she did not wish him to marry Dora, so she wrote the letter, sealed it, stamped it, took it to the office and mailed it. It seems Dora was then absent, but returned in a few days, and the letter was given to her in the presence of the plaintiff. She read the letter, then gave it to him. He read it and took it immediately to Dora's father, who either read it or heard it read. The plaintiff then took it to his office, sent for his friends and confidants, among others, Walker and Cameron. He read the letter to Walker and Cameron. On the same day Cameron procured the attendance of Mrs. Collins at his store, where he spoke to her about the letter, and, as she testifies, said: "Byam is going to sue you for it," and he wished to know what she "knew about Byam." In answer, as she testifies, "I told him I didn't wish to tell him; he said he wanted me to tell him just as though he was my lawyer; he said, 'I am your friend and I want you to have perfect confidence in me,' and he said, 'you know if a person employs a lawyer they tell him everything,' and I said I didn't wish to tell him; I said, 'you have heard these things yourself;' he said he didn't know, he would rather I would tell and he could tell better." She avoided and resisted his inquiries and endeavored to leave, but he persisted and "held on to the door-latch" so she could not go out, and the disclosures of that interview now form the subject of complaint as set out in the second cause of action.

The fourth count is founded upon the letter and publication already referred to. At the close of the evidence the plaintiff's counsel asked the trial court to "hold as matter of law and charge the jury, that the cause of action set out in the fourth count of the complaint was libelous and the communication not privileged; that the cause of action has been

Dissenting opinion, per DANFORTH, J.

established and the only question for the jury is the question of damages." The court declined, but, after reading the letter to the jury, and declaring it to be libelous, charged that liability for writing and publishing it might be avoided by showing that what was written was a privileged communication, and called upon them to determine whether it was of that character. The plaintiff's counsel excepted to the refusal to charge as requested and also to the submission of the question to the jury.

The whole charge must be taken together, and, so taken, it is apparent that the trial judge violated no rule of law in respect to this matter. He called the attention of the jury to the evidence as to the relations between the parties and the request by Miss McNaughton for information, and also to the statements in relation to the plaintiff which had come to the ears of the defendant, and then said: "If the relations of these persons was of such an intimate character as to warrant Mrs. Collins in warning Miss McNaughton against a person whom she had reason to believe was not a fit person, and if Mrs. Collins acted fairly, in good faith, conscientiously, although mistakenly, there can be no recovery against her upon that cause of action." And again: "I say to you, therefore, that if Mrs. Collins had heard these things and the others to which she has testified, and believed them to be true, and had reason to believe them to be true, and if she acted honestly, and conscientiously in writing that letter, it is a privileged communication and there can be no recovery against her for that count." And, finally: "If you find the lady was justified in those things or she acted conscientiously and intelligently, as a reasonably prudent person would have acted in similar affairs, on account of her relationship with this lady, your verdict will be generally for the defendant." "If certain facts exist" the judge, in substance, says "the letter is privileged." Whether those facts did exist he properly left for the jury to determine. (*Stace v. Griffith*, 2 P. C. L. R. 420.) There was, therefore, no error in making

Dissenting opinion, per DANFORTH, J.

this disposition of the question. (*Klinck v. Colby*, 46 N. Y. 427; *Hamilton v. Eno*, 81 id. 117.) He held the letter upon its face to be libelous, but as liability for even a libelous publication may be defeated by the occasion or circumstances under which it was made; he left those matters to be inquired of by the jury. We have them established by the verdict and assuming their existence, the important inquiry now is whether the trial judge was right in holding the letter privileged.

The parties directly concerned in this question resided in the same town. The defendant Mrs. Collins and Dora McNaughton (now Mrs. Byam), were from childhood neighbors and intimate friends, and at the time, made material by this inquiry, were unmarried. The latter seems to have supposed that the former had better opportunities than herself to learn the character of the young men of that town, and requested that she would communicate to her anything she might know concerning, among others, those "who went with her," obviously indicating persons whose attentions were of the nature of addresses and given in view of matrimony. In response to this request, as the evidence tends to show and as the jury have found, the defendant wrote the letter complained of. Previous thereto she had uttered no word of disparagement or reproach concerning the plaintiff, and the letter itself was sealed and directed to Miss McNaughton, and in that condition delivered to her. There was no other publication by the writer or with her assent. Was the communication privileged? If so, in the absence of malice, there was a perfect defense to the action so far as the fourth count is concerned. This qualification requires no discussion, because, at the request of the learned counsel for the plaintiff, the trial judge charged the jury that "when one stands in a privileged relation, but makes a false charge, the proof is on her to disprove malice and show that she acted in good faith," thus improperly shifting the burden from the plaintiff upon whom, in the supposed case it properly lay, to the defendant to whom it did not belong. (*Gassett v. Gilbert*, 6 Gray, 94; *Somerville v. Hawkins*, 10 C. B. 583; *Hastings v. Lusk*, 22 Wend. 414.)

Dissenting opinion, per DANFORTH, J.

The error was against the defendant, but that is of no importance since the jury by their verdict found that there was no malice, and that the defendant acted in good faith. It is well settled that without malice, either express or implied, an action for defamation, by words spoken or written, cannot be supported. In ordinary cases malice is implied from the slander, but there may be a justification from the occasion, and when this appears, an exception to the general rule is created, and the words must be proven to be malicious as well as false. In that aspect of the case, as already stated, the plaintiff failed. The question as to privilege is, however, yet to be considered.

The letter is one of warning or entreaty. It names no one as its subject, but it was conceded that the person referred to was the plaintiff, and he is held up in numerous phrases conveying divers degrees of disparagement and imputation, to reproach and as a person to be feared and avoided. (*Craft v. Boite*, 1 Saund. and note, 248.) The trial judge, therefore, ruled that it was libelous, and the appellant is entitled to have that ruling stand as the law of the case. The publication was admitted. From these circumstances the law supplied the rest, and the burden of justification or excuse was cast upon the defendant. (*Lewis v. Few*, 5 Johns. 35.) The question, therefore, is whether the occasion of the publication, or the circumstances prompting it, furnish a legal excuse for that act, and so repel the inference of malice arising from the matter of it, as to bring it within the exception to which I have referred. If it does, then in legal contemplation the communication is privileged. Of such communications there are two classes: In one the privilege is absolute and a shield against any action for defamation, as where the charge, even if false and malicious, is made in the course of official duty or under certain other circumstances not embracing those before us; in the other class the privilege is qualified and may be overcome by proof of malice. This class includes cases where the interest and welfare of society and common convenience require that the defendant should be permitted to speak freely

Dissenting opinion, per DANFORTH, J.

in the relation in which he is placed, provided he confines himself within the bounds of what he believes to be the truth. (*Hastings v. Lusk*, 22 Wend. 410.)

The law frequently referred to upon this subject is to be found in *Toogood v. Spyring* (1 Crompt. Mees. & Ros. 181-192), and requires that the communication to be privileged should be fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs where his interest is concerned. In *Harrison v. Bush* (32 Eng. L. & E. 173), substantially the same rule is restated, but it is added "that duty cannot be confined to legal duties which may be enforced by indictment, action, or *mandamus*, but must include moral and social duties of imperfect obligation," and as thus amplified, the rule is adopted in this court and may be considered as well settled (*Ormsby v. Douglass*, 37 N. Y. 477; *Hamilton v. Eno*, 81 id. 116.) A common application of the rule is to words spoken by a former master in giving a character of a servant (*Weatherston v. Hawkins*, 1 Term Rep. 110), or in answering an inquiry concerning the solvency of a tradesman or banker, or between persons having a common interest in the subject to which they relate. It applies, however, to other cases of the same nature, and is meant to protect the communications of business and the necessary confidence of man in man, as where one employed by a sheriff to ascertain and inform him of the facts relating to an interference with a levy upon certain cattle, wrote a letter charging the plaintiff with feloniously taking them (*Washburn v. Cooke*, 3 Den. 110), or where, at the request of the father, a person made inquiry as to the character of his daughter's husband. (*Atwill v. Mackintosh*, 120 Mass. 177.) In each instance the report, if made in good faith, and reasonably believed true, was held to be privileged. (*Atwill v. Mackintosh*, *supra*.) So it is said to extend to the confidential communications of friendship (*Holt on Libel*, 235), and will undoubtedly include every case where in the discharge of any legal, natural, or social obligation, the defendant states what he honestly believes the plaintiff's

Dissenting opinion, per DANFORTH, J.

character to be, whatever the charges may be which he thus imputes to him. Thus, in *McDougall v. Claridge* (1 Camp. 267), it was held that a letter written confidentially concerning a solicitor, and under an impression that its statements were well founded, could not be the subject of an action; and in *Heser v. Donson*, mentioned in Buller's *Nisi Prius*, page 8, where the defendant said "in confidence and friendship, by way of warning," to one about dealing with the plaintiff, words affecting his credit, no action would lie because the manner of speaking repelled the idea of malice. In *White v. Nicholls* (3 How. [U. S.] 286), Justice DANIEL enumerates among such communications, "words spoken in confidence and friendship as a caution," and applying the same principle to specific cases, it is laid down in a recent work on this subject (Odgers on Libel and Slander, 210), that a father, guardian, or intimate friend may warn a young man against associating with a particular individual, or may warn a lady not to marry a particular suitor, though under the same circumstances a stranger could not do so without incurring liability.

Among other instances of privilege, and of the same nature, is any communication required by the interest of the person to whom it is made and reasonably called for or warranted by the relation in which the person making it stands to him, as a letter written in good faith by a person to his mother-in-law, warning her of the bad character of the man she was about to marry. (*Todd v. Hawkins*, 8 Car. & P. 88-91.) The same principle was applied in *Adcock v. Marsh* (8 Ired. [Law], 361.) It there appeared that Anderson Adcock was twice married. His first wife died, leaving a daughter Sally and one other. Upon his second marriage the defendant, Mrs. Marsh, advised the daughters of the first Mrs. Adcock that they ought not to live at their father's, giving reasons in words relating to the plaintiff, his then wife, which were in themselves *prima facie* actionable. In excuse it was shown that the first Mrs. Adcock "had requested the defendant Marsh, with whom she was very intimate, to give 'advice' to her daughters," but the trial judge ruled that this was insufficient in any view to rebut the

Dissenting opinion, per DANFORTH, J.

implication of malice, and after verdict for the plaintiff a new trial was granted, the court of review holding that the communication was privileged if made by the defendant in good faith, and as to that the jury were the proper judges. The learned judge, speaking for the court and referring to the ruling of the trial judge, said: "The idea seems to have been that the communication was not a privileged one, because the defendant had no interest in the matter and stood in no relationship to the witness," the person advised by defendant, "but was in every respect a volunteer," and, after citing and commenting on various cases, says, in substance, that whether there was just cause for the opinion expressed by Mrs. Marsh or not, she was justified in making it known to the daughter if she honestly held that opinion, "and that her communication so made was a privileged one." "And we further hold," he says, "that without any request from the mother, she would under the other circumstances have been justified."

To the same effect are the cases in our own court. In *Lewis v. Chapman* (16 N. Y. 369), SELDEN, J., enunciates the rule as embracing both alternatives, and says: "There is no doubt that when the communication is made *bona fide* in answer to inquiries from one having an interest in the information sought, or when the relation between the parties by whom and to whom the communication is made is such as to render it reasonable and proper that the information should be given, it will be regarded as privileged," and referring to the authorities, says, these cases show that all that is necessary to entitle such communications to be so regarded is "that the relation of the parties should be such as to afford reasonable ground for supposing an innocent motive for giving the information and to deprive the act of an appearance of officious intermeddling with the affairs of others," and although the information given in that case was volunteered, and not in answer to any inquiry, the judges all agreed that the relations existing between the person addressed and the defendant, rendered the communication privileged. In the later case of *Sunderlin v. Bradstreet* (46 N. Y. 128), it appeared that the defendants, of their

Dissenting opinion, per DANFORTH, J.

own volition and for their own profit, collected information concerning the condition of traders, and this they communicated to subscribers not interested in the matter, and the court, reiterating the rule laid down in *Lewis v. Chapman* (*supra*), held that, owing to that want of interest in the person addressed, the communication was not privileged. Protection would seem to be due, therefore, to communications between persons having relationship, whether by blood or marriage, or as principal and agent, attorney and client, or as intimate friends, or as the result of any trust or confidence, provided such communications are fairly warranted by a reasonable occasion and honestly made.

It follows that the term malice, in a legal sense, has no application where there is a just cause or occasion for speaking the words complained of, although under other circumstances they would constitute a slanderous charge. (*Jones v. Givin*, Gilbert's Cas. 185; *Washburn v. Cooke*, and other cases, *supra*.) In discussing this question the learned judge, already quoted, says: "When the circumstances show that the defendant may reasonably be supposed to have had a just and worthy motive for making the charge, then the law ceases to infer malice from the mere falsity of the charge and requires from the plaintiff other proof of its existence." (*Lewis v. Chapman*, *supra*.) The facts found by the jury, and above adverted to, bring the case at bar within the principle and the rule thus stated. The occasion was the courtship of the plaintiff, and the object of the letter was to give information of his character. It was written in confidence and in friendship to one sought by him in marriage, and thus having a vital interest in the subject, and written also in response to her request. These conditions seem to answer the first branch of the proposition laid down by Judge SELDEN in the *Chapman Case* (*supra*), and by Judge ALLEN in the *Sunderlin Case* (*supra*), and also bring the communication directly within the other branch of the rule. If we regard the communication as volunteered, it still remains that Dora, the party to whom the communication was made, had an interest in it, and the writer stood, by

Dissenting opinion, per DANFORTH, J.

reason of her intimate friendship and request, in such relation to her as to make it, at least, proper that the defendant should warn and put her on further inquiry.

I think the communication was privileged by the occasion and by the position of the writer, and the court committed no error in refusing to charge otherwise. Whether the letter was in excess of privilege so conferred, I need not inquire, for such question was for the jury and it was not raised at the trial.

As to the second cause of action, the counsel¹ for the appellant asked the court to charge: "That the charges set out in the second count of the complaint have been substantially proved and stand uncontradicted, and the plaintiff is entitled to recover, and the only question for the jury is one of damages. The court declined so to hold and charge, and plaintiff's counsel duly excepted." In this there was no error:

1st. The allegations of the complaint are not admitted by the answer, but denied, and the plaintiff went into evidence to sustain the issue.

2d. Between the plaintiff's witnesses and the evidence of the defendant there was a conflict.

3d. The communication to Cameron was given in confidence, at his request, and under circumstances which might very well lead to the conclusion that Cameron, as the friend or even agent of the plaintiff, was by him put upon an inquiry, suggested by the letter just before read to him by the plaintiff. (*Weatherstone v. Hawkins, supra*; *King v. Waring*, 5 Esp. [N. P.] 13.) The statement was not voluntary, and the occasion of speaking, as well as the words spoken, were to be considered. The submission of it to the jury was proper (2 Greenl. on Ev. § 421), and the language of the judge as applied to it was not inappropriate. (*Weatherstone v. Hawkins, supra*.)

4th. Nor was it necessary to plead specially that the communication to Cameron was privileged. The defendant's answer alleged that the communication, such as it was, to Cameron was drawn out by him — "was a confidential com-

Dissenting opinion, per DANFORTH, J.

munication and was made without malice and without any intent to injure the plaintiff," and in the belief of its truth, and denied, among other things, the allegation of malice contained in the complaint. This goes to the very root of the action. If true, it shows there was no malice; and as formerly the defense of privilege was open under the general issue (*Hastings v. Lusk, supra*; *Howard v. Thompson*, 21 Wend. 324), so it is now under the denial.

The learned counsel for the appellant argues that the plea of justification set up as a separate defense was insufficient, because, he says, "the matters alleged are stated to have been known at the commencement of the action, and not at the time of uttering or writing the words attributed to the defendant." No objection was made to evidence on that account, and the question was only presented to the trial judge as he was about to give the case to the jury, and then in these words: "That the court should hold as a matter of law that there is no sufficient plea of justification set up in the defendant's answers, and the proofs have not sufficient force to sustain a justification."

The proof shows that the defendant had heard the matters referred to when she wrote the letter, and no objection was made that the evidence was not competent under the answer. But the request when made was double and required the court to pass upon the sufficiency of the evidence to sustain the justification as well as its final presentation upon the pleadings. One branch was for the jury, and upon both grounds the refusal of the court may stand. The other questions presented by the appellant were properly disposed of by the General Term.

The judgment appealed from should, I think, be affirmed.

All concur with EARL, J., for reversal, except DANFORTH, J., dissenting.

Judgment reversed.

Statement of case.

MAX GOEBEL, Respondent, v. SOPHIA IFFLA, Individually and as Trustee, etc., Defendant. LEO SCHLESINGER, Purchaser, Appellant.

F. died in 1853, leaving a widow and one son, who afterwards married and had one child. By his will F. devised his real estate to his wife, in trust, for the enjoyment of herself and his children during her life, remainder to his children, and in case they died without issue before his wife, then to the testator's brothers and sisters. The widow accepted the trust and, on notice to the testator's son, applied to the Supreme Court for authority to mortgage the real estate for the purpose of preserving and improving it. An order was made permitting the widow, as trustee, to borrow \$900, and in that character to execute a bond and mortgage to secure its payment. The order declared that upon the execution and delivery of the mortgage it should be a first lien on the land, the same as if executed by F. in his lifetime, and "without regard to the persons who may or shall eventually become seized or possessed of any estate or interest in said land under said will." A mortgage was executed in conformance with the order, which purported to convey all the estate F. had in the land during his lifetime and all the estate of the widow, individually, and as trustee and beneficiary, and also of the devisees in and under the will. In an action to foreclose the mortgage, the trustee, the son, such of the brothers and sisters of the testator as were living, and the children of those who had died, were made defendants, and were alleged to "have or claim to have some interest in or lien upon the said mortgaged premises or some part thereof, because or by reason of the provisions of said will in the event of the death of the son of the testator," and his child and any other children born to him dying prior to the testator's widow. It was also alleged that such interest or lien was subsequent and subordinate to the lien of plaintiff's mortgage as would also be the rights and interests of said defendants if they accrued. The defendants were all duly served and judgment by default was entered, which directed a sale and that the surplus should be invested by the trustee, and upon the happening of the contingency mentioned in the will should pass to the devisee or persons entitled thereto pursuant to the provisions of the will. The purchaser at the foreclosure sale refused to complete his purchase on the ground that the expectant estate of the testator's brothers and sisters has not been divested, and in case of the death of his son without issue during his mother's life, the gift to them would take effect. In proceedings to compel said purchaser to complete his purchase, *held*, that all the parties in interest having been made parties to the foreclosure suit and thus given an opportunity to pay off the mortgage or defend against it, the judgment was final; that the purchaser

Statement of case.

would acquire a good title and should be compelled to complete his purchase.

As to whether on an application made under the statute (Chap. 275, Laws of 1882, and chap. 26, Laws of 1884, amending part 2, chap. 1, tit. 2, art. 2 of the Revised Statutes "relating to uses and trusts") by a trustee to mortgage real estate held by him for the purpose of raising funds to be applied in preserving or improving it, not only the interest of the trustee and beneficiaries of the trust, but also the rights and interests of those who may be entitled in remainder on the expiration of the trust, may be covered, *quære*.

While prior incumbrancers are neither necessary nor proper parties to an ordinary action of foreclosure, when made parties under the general allegation that they claim an interest "as subsequent purchaser, incumbrancer or otherwise," a decree will not affect them.

If facts upon which the plaintiff in a foreclosure suit relies to defeat a prior title are stated, the defendant whose title is thus assailed may demur to the complaint upon the ground that the plaintiff has no right to bring him into court to try his title in such an action.

Where, however, such facts are stated as will, if admitted, subject the title of a defendant to the plaintiff's mortgage and to the relief sought, and such defendant makes default or answers, and judgment goes against him, he will be estopped from afterwards setting up his interest as against the judgment, and what binds him in this respect cannot be questioned by any other person.

(Submitted October 2, 1888; decided November 27, 1888.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made March 28, 1888, which reversed an order of Special Term denying the plaintiff's application and granted the application to compel Leo Schlesinger, the purchaser at a foreclosure sale therein to complete his purchase, and granted the application of said purchaser to be released from his purchase. (Reported below, 48 Hun, 21.)

Martin Ficken, senior, devised his real estate to Sophia, his wife, in trust for the enjoyment of herself and his children during her life, remainder to his children, but in case they died without issue before his wife, then to his brothers and sisters. He died in 1853, seized in fee of certain premises in the city of New York, and leaving Sophia, his wife, and one child, Martin Ficken, surviving. He afterwards married and had one child, Winona Ficken, a minor.

Statement of case.

Sophia accepted the trust, and upon notice to Martin Ficken the son, applied to the Supreme Court for authority to raise money upon mortgage on the real estate above referred to, for the purpose of preserving and improving it. The court being satisfied of its necessity, made an order in pursuance of the application, and gave leave to her, as trustee, to borrow \$900, and in that character execute her bond and mortgage to secure its repayment in one year from the date thereof, with interest. The court directed that the mortgage should contain appropriate reference to the will of the deceased, and declared that upon its execution and delivery it should be a first lien upon the land, and upon all estate, right, title and interest whatever therein, "with the same force and effect as if executed by the deceased in his lifetime, and without regard to the persons who may or shall eventually become seized or possessed of any estate or interest in said land under said will," and also provided for and directed the application of the moneys raised by said mortgage towards the preservation and improvement of the mortgaged premises.

Relying upon this order, and at the request of the trustee, the plaintiff loaned to her the money authorized to be borrowed, and received from her a bond and mortgage conforming to the direction of the court, and purporting to convey all the estate which the testator had in the land during his lifetime, and all the estate of Sophia, individually and as trustee, and as beneficiary, and also of the devisees in and under said will. The mortgage contained the usual provisions for proceedings in case of default, and was duly recorded in the proper office. Default did occur, and the plaintiff commenced an action to enforce payment. His complaint contained, among others, the matters above referred to, set out the will, and named as parties defendant the said trustee, Martin, the son of the testator, and such of the brothers and sisters of the testator as were living, and the children of those who had died, and alleged that they "have or claim to have some interest in, or lien upon, the said mortgaged premises, or some part thereof, because or by reason of the provisions of said

Statement of case.

will, in the event of the death of the son of the testator and the said Winona, and any other children born to said son of the testator, dying prior to the said Sophia," but also alleging that such interest, or lien "is subsequent and inferior to the lien of the plaintiff's said mortgage, and is subject and subordinate thereto; and that the rights and interests of said defendants, and each and all of them, in the premises, if the event above named should transpire, would, because and by reason of the facts hereinbefore alleged, be inferior and subsequent to said mortgage," and demanded judgment of foreclosure against all the defendants and a sale of the mortgaged premises.

The defendants were duly served with process, but made default, and afterwards judgment pursuant to the prayer of the plaintiff was granted, and it was also ordered that if upon the sale more than the amount due should be realized, the surplus should be invested by the trustee, and upon the contingency mentioned in the will it should "pass to the devisee or persons entitled thereto, pursuant to the provisions of the will. Upon sale of the mortgaged premises under this judgment, Leo Schlesinger became the purchaser at the price of \$6,000, signed the usual conditions of sale and paid down \$600 as thereby required. He subsequently refused to pay more, and plaintiff instituted proceedings in the Supreme Court to compel him to complete the purchase. He resisted the application, denying none of the allegations in the moving papers and expressing a willingness to complete the purchase provided he could obtain a good title, but alleging that he cannot and asks to be relieved of the purchase and have the money paid restored to him, and compensation made for the expenses incurred in the examination of the title and otherwise. The defect alleged is that the expectant estate of the brothers and sisters in the premises has not been divested, and that upon the death of Martin Ficken, the son, without issue during his mother's life, the gift to them would take effect. The court at Special Term denied the plaintiff's application. released the purchaser and directed the money already paid to

Statement of case.

be returned, and in addition thereto, \$225, being the counsel fees and disbursements incurred by him in causing the title of the premises to be examined. Upon appeal the General Term reversed this order and granted the application of the plaintiff. The purchaser appeals to this court.

Ferdinand Kurzman for appellant. The legislature has no power to authorize, without their consent, the sale of lands in which adults, competent to act for themselves, have an interest, vested or contingent, unless a sale be necessary, for the payment of taxes or assessments, or some other public use or purpose. (*Taylor v. Porter*, 4 Hill, 141; *Powers v. Bergen*, 6 N. Y. 358; *Wynehamer v. People*, 13 id. 378; *In re N. Y. P. E. Pub. School*, 31 id. 591; *Brevoort v. Grace*, 53 id. 245; *Wilkinson v. Leland*, 2 Pet. 657.) A mortgagee has no right to make one who claims adversely to the title of the mortgagor, and prior to the mortgage, a party defendant for the purpose of trying his adverse claim in a court of equity. (*Browning v. Smith*, 6 N. Y. 82; *Rathbone v. Honey*, 58 id. 502; *Frost v. Koon*, 30 id. 448, 449; *Em. Ind. Savings Bk. v. Goldman*, 75 id. 131; *Eagle Fire Ins. Co. v. Lent*, 6 Paige, 635; *Mer. Bank v. Thompson*, 55 N. Y. 11; *Payn v. Grout*, 23 Hun, 136.) The judgment is not final and conclusive, because the matter could not have been litigated and determined in the action. (*Malloney v. Horan*, 49 N. Y. 116; *People v. Dennison*, 84 id. 280.) A purchaser at a judicial sale is entitled to a marketable title. (*Fleming v. Burnham*, 100 N. Y. 8; *Jordan v. Poillon*, 87 id. 521.

John J. Gleason for respondent. Notwithstanding the act of 1882 (Chap. 275), the legislature and the court, in the case of authority conferred by it, had power to protect and preserve the trust estate, and at the expense of the estate; and the realty could be sold in the exercise of this power, and perfect title given. (*Jacobus v. Babcock*, 16 N. Y. 246; *Leggett v. Hunter*, 19 id. 445; *In re P. E. School*, 31 id. 574; *New v. Nicoll*, 73 id. 127.) So, too, the trustee would have had the

Statement of case.

power, independently of the amendment of the statute, to incumber the property beyond her mere life estate; she might have leased it for a term of years. (*McAdams Landl. and Ten.* 93; *Labatut v. Delatour*, 54 How. Pr. 435.) The trustee having the power to make the repairs and improvements, which, in this case, were compulsory and required to preserve the building, and to comply with the requirements of the laws as to buildings in New York city, had the power to charge the land and building with the payment thereof, especially so in this case, where, as the petition shows, the trustee had no funds to pay for them, and to create a lien for same thereon. (*New v. Nicoll*, 73 N. Y. 127; *Perry v. Board of Missions*, 102 id. 99.) The court had power, and it was within its jurisdiction to declare and adjudge this lien, and to sell the property for its enforcement. (*Perry v. Board of Missions*, 102 N. Y. 99; *New v. Nicoll*, 73 id. 127.) This being so, the application to the court for permission to create a lien by mortgaging the property, in effect the same as the equitable lien, would require no other or greater or different notice than an action to have adjudged and enforced the equitable lien. (*Nodine v. Greenfield*, 7 Paige, 544.) All the contingent remaindermen were parties to this action, and were effectually cut off by the judgment. (*Jordan v. Van Epps*, 85 N. Y. 427, 435, 436; *Morris v. Morange*, 38 id. 172; *Brown v. Mayor, etc.*, 66 id. 385; Code of Civ. Pro. § 1632; *Brown v. McKening*, 64 N. Y. 78, 84; *Emigrant Bank v. Goldman*, 75 id. 127; *Brown v. Kenny Settlement Cheese Co.*, 59 id. 242.) The judgment in this action is a conclusive bar against all estate, right, title or interest of the remainderman, vested or contingent, and of each and all the defendants in the premises. (*Jordan v. Van Epps*, 85 N. Y. 427, 435, 436; *Morris v. Morange*, 38 id. 172; *Brown v. Mayor, etc.*, 66 id. 385; Code of Civ. Pro. § 1632; *Brown v. Volkening*, 64 N. Y. 76, 84; *Emigrant Bank v. Goldman*, 75 id. 127; *Brown v. Kenny Settlement Cheese Co.*, 59 id. 243.) The question presented in this case was as to the priority of plaintiff's mortgage over the rights and interests of each and all defendants;

Opinion of the Court, per DANFORTH, J.

the facts and demand upon this question being expressly alleged and charged, and, therefore, the judgment is a bar and an estoppel. (*Jordan v. Van Epps*, 85 N. Y. 427; Abb. Trial Ev. 826; *Cromwell v. County of Sac.*, 94 U. S. [4 Otto] 351, 352; *Smith v. Smith*, 79 N. Y. 634.) The judgment herein is conclusive, and binding upon all remaindermen and persons who had expectant estates, contingent and otherwise, and bars also their descendants. (*Jordan v. Van Epps*, 85 N. Y. 427; *Brown v. Mayor, etc.*, 66 id. 385; *Gates v. Preston*, 41 id. 113; *White v. Merritt*, 3 Seld. 352; *Baron v. Abeel*, 3 Johns. 481; *Mead v. Mitchell*, 17 N. Y. 210, 214; *Williamson v. Field*, 2 Sandf. Ch. 533, 563; *Eagle Fire Ins. Co. v. Commett*, 2 Edw. Ch. 127; *Nodine v. Greenfield*, 7 Paige, 544, 548; *Brevoort v. Brevoort*, 7 N. Y. 136, 139, 140.)

DANFORTH, J. The application for leave to mortgage is put by the respondent upon the provisions of chapter 275 of the Laws of 1882, and chapter 26 of the Laws of 1884, amending article 2, title 2, part 2, of the Revised Statutes, "Relating to uses and Trusts." That act provides that the Supreme Court may, upon such terms and conditions as it deems just and proper, authorize a trustee to mortgage real estate held by him for the purpose of raising funds to be applied in preserving or improving it. It may be, as the appellant claims, that the order, in this case, exceeds that intended by the legislature, inasmuch as it covers not only the interest of the trustee and beneficiaries of the trust, but also takes in the rights and interests of persons who may be entitled in remainder on the expiration of the trust. It is not necessary, however, to pass upon that question, for those persons were made parties to the foreclosure of the mortgage, and so given an opportunity to pay off the mortgage if they saw fit to do so, or defend against it, and show, if they could, that it could not be enforced against them. They did neither. The case, therefore, is distinctly within the principle on which *Jordan v. Van Epps* (85 N. Y. 427), and *Barnard v. Onderdonk* (98 id. 158), were decided, and is controlled by the rule that a

Opinion of the Court, per DANFORTH, J.

judgment rendered by a court having competent authority to deal with the subject-matter involved in the action, and jurisdiction of the parties, is final and conclusive between them.

The cases cited by the appellant do not contravene that doctrine. Many of them were reviewed by the late learned Chief Judge DAVIES in *Frost v. Koon* (30 N. Y. 428), and from that examination, and the cases referred to, it appears that, while prior incumbrancers are neither necessary nor proper parties to an ordinary action of foreclosure, and that when made such under the general allegation that they claim an interest "as subsequent purchaser, incumbrancer, or otherwise," a decree will not affect them; and moreover, that if the facts upon which the plaintiff relies to defeat that prior title are stated, the defendant whose title is thus assailed may demur to the complaint upon the ground that the plaintiff has no right to bring him into court upon the foreclosure to try the validity of his title, yet, if the party so made a defendant should, instead of demurring, answer and litigate the question, and then judgment should go against him, no case decides that the judgment would not conclude him in a collateral action, nor do those cases decide that where such facts are stated as will, if admitted, subject that title to the plaintiff's mortgage and to the relief sought, the party against whom they are alleged will not in like manner be estopped from afterwards setting up his interest as against the judgment in the foreclosure action. And what binds him can be questioned by no one else. The present case is within the general rule, that a judgment is conclusive between the same parties and their privies upon all matters embraced within the issue in the action, and which were or might have been litigated therein. It is immaterial whether issue was joined by the defendant, or tendered by the plaintiff and left unanswered. The rule applies as well to a judgment by default when the facts stated warrant the relief sought as to one rendered after contest. (*Gates v. Preston*, 41 N. Y. 113; *Newton v. Hook*, 48 id. 676.)

We agree, therefore, with the General Term in the conclusion.
SICKELS — VOL. LXVI. 23

Statement of case.

clusion that the title tendered to the purchaser is a good title and that he should be required to complete his purchase.

The order appealed from should be affirmed, with costs.

All concur.

Order affirmed.

111	178
140	104

111	178
150	93

111	178
159	97

PETER W. VAN BRUNT, Appellant, v. STEPHEN W. VAN BRUNT, Impleaded, etc., Respondent.

M. died leaving eight children, seven of whom were married and had children. By her will she gave the whole of her residuary estate to her executors, in trust, to pay over the rents, income and profits to her children equally during their natural lives, and after their decease to their respective wives or husbands during their lives or until they should remarry. The will then provided: "If any of my children should die without issue, or without leaving a husband or wife him or her surviving, then I give, devise and bequeath his or her share to the survivor or survivors of them. * * * If he or she leaves a husband, him or her surviving, then I give, devise and bequeath his or her share to the survivor or survivors of my said children * * * after the decease or remarriage of said husband or wife." The executors were authorized to sell any of the residuary estate and invest the proceeds. In an action for partition, *held*, that the trust was valid and there was no unlawful suspension of the power of alienation; that the words husband and wife, as used in the will, referred to those living at the death of the testatrix, and so the limitation as to each part of the devisable trust ran for two lives in being at its creation.

It seems that the power of sale conferred upon the executors did not effect an undue suspension of the power of alienation.

Schettler v. Smith (41 N. Y. 328) distinguished.

The residuary clause also provided that, in case any of the testator's children should die leaving issue, "said issue shall represent their parents *per stirpes* and not *per capita*, and receive their parent's share" of the rents and profits after the death or remarriage of their surviving parent until they became of age, when their interest shall be given to them. *Held*, that upon the death of any child, and of the husband or wife of that child who was living at the death of the testatrix, the portion or share of such child vested at once in his or her children, each one of whom taking his or her proportion in fee, subject only to a postponement of possession during his or her minority, and to the execution of the trust upon the rents and profits during that period; and there was, therefore, no unlawful suspension of the power of alienation; that the fact that the issue of each child were to take *per stirpes* does not make them joint tenants as the statute fixes

Statement of case.

how they shall take as between themselves (1 R. S. 727, § 44), and makes them tenants in common, in the absence of an express provision for a joint tenancy.

(Submitted October 2, 1888; decided November 27, 1888.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made April 11, 1888, which affirmed a judgment in favor of defendants entered upon an order sustaining a demurrer to the complaint.

This was an action for the partition of lands in the city of New York, formerly owned by Margaret Van Brunt, deceased, and disposed of under the residuary clause in her will.

All the children of the testatrix, with their husbands and wives, were made parties to the action. The plaintiff, as son and heir-at-law of the testatrix, assails the validity of the residuary clause pursuant to section 1537 of the Code of Civil Procedure, as working an undue suspension of the power of alienation, and so claims that the residuary real estate was not disposed of by the will. The executors, with the other children of the testatrix, demurred to the complaint. The residuary clause of the will in question is as follows, viz. :

“All the rest and residue of my personal property and all my real estate of which I may die seized, I give, devise and bequeath to my executors, hereinafter named, in trust, to collect the rents, issues, profits and income therefrom, and pay over the same to my children herein named, share and share alike, at such times, in such manner and in such amounts as my said executors shall deem most prudent, for and during each of their natural lives, free from any claim or demand that may be held against any of them by any creditor or creditors; and after their decease to their respective wives or husbands during their lives, or until they remarry, also at such times, in such manner, and in such amounts as my said executors shall deem most prudent. If any of my said children should die without issue, and without leaving a husband or wife him or her surviving, then I give, devise and bequeath his or her share to the survivor or survivors of them,

Statement of case.

share and share alike. If he or she leave a husband or wife him or her surviving, then I give, devise and bequeath his or her share to the survivor or survivors of my said children, share and share alike, after the decease or remarriage of said husband and wife. If any of my said children die leaving issue, said issue shall represent their parents *per stirpes* and not *per capita*, and receive their parent's share of said rents, profits, issues and income, after the decease or remarriage of their father or mother, at such time, and in such manner, and in such amounts as my said executors shall deem most prudent, until they arrive at the age of twenty-one years (21) when their interest shall be given to them, to be held and enjoyed by them, their heirs and assigns forever."

The material facts set forth in the complaint are stated in the opinion.

Elon R. Brown for appellant. The words husband and wife, as used by the testatrix in the residuary clause of her will, must be construed to refer to one becoming such after the death of the testatrix, though possibly unborn and not in being at that time. (*Schettler v. Smith*, 41 N. Y. 328; *Quackenbos v. Kingsland*, 102 id. 128, 130, 131.) A trust to pay over rents and profits created in language which might permit the continuance of the trust beyond a period measured by two lives, in being at the death of the testator, and a single minority of a remainderman in addition thereto, is void. (*Manice v. Manice*, 43 N. Y. 374-384.) Where a primary gift not vested is declared void, because contingent on an event other than the determination of one or two lives in being, the limitation over dependent upon the same contingency, is void also, and cannot be sustained by regarding it as accelerated and vested immediately. (*Rose v. Rose*, 4 Abb. Ct. App, Dec. 108.) In the interpretation of the residuary clause in the will, the court will not only look at the language employed, but the surrounding circumstances, to determine what the intention of the testator was. (*Kerr v. Dougherty*, 79 N. Y. 348; *Wolf v. Van Nostrand*, 2 id. 236.) There

Statement of case.

being words of severalty, the trust itself is necessarily divisible, as far as the beneficial disposition of the will calls for the division and separation of any portion of the estate from the residue. (*Mason v. Mason's Exrs.*, 2 Sandf. Ch. 432; *Savage v. Burnham*, 17 N. Y. 561, 571.) The excess over two lives in being cannot be dropped and the rest sustained. (*Knox v. Jones*, 47 N. Y. 389.) So far as this item in the will attempts to create a trust to pay the rents, profits and income to the husband or widow of a deceased child, as that husband or widow "might possibly be unborn at the death of the testator," it is void. (*Schettler v. Smith*, 41 N. Y. 328, 339; *Manice v. Manice*, 43 id. 384; *Kennedy v. Hoy*, 105 id. 134; *Van Schuyler v. Mulford*, 59 id. 432; *Knox v. Jones*, 47 id. 389.) A trust with remainder to survivors will not be sustained by cutting off a trust with remainder to issue. (*Harrison v. Harrison*, 36 N. Y. 543; *Schettler v. Smith*, 41 id. 328; *Manice v. Manice*, 43 id. 383, 384; *Van Schuyler v. Mulford*, 59 id. 426.) As the testator was intestate upon the death of the wife, as to the entire *corpus* of the estate, it was equally divided among his heirs. (*Benedict v. Webb*, 98 N. Y. 466; *Tiers v. Tiers*, Id. 568.) The provision for the wives or husbands who might not be in being at the testator's death was cut off because it was a separate trust in a separate paragraph. (*Ward v. Ward*, 105 N. Y. 168.)

William C. Spencer for respondent. Plaintiff cannot, if unable to establish that the testator died intestate as to the premises in question, change his action into one for the construction of the will. (*Schuyler v. Schuyler*, 59 N. Y. 426.) The courts will lean in favor of the preservation of all such valid parts of a will as can be separated from those that are invalid without defeating the general intent of the testator, and it is no objection to the application of this rule that the limitations, as well those which are good as those alleged to be bad, are embraced in a single trust. (*Savage v. Burnham*, 17 N. Y. 561, 576; *Everitt v. Everitt*, 29 id. 39, 57, 79; *McKean v. Kearney*, 57 How. 349; *Darling v. Rogers*, 22 Wend. 483;

Opinion of the Court, per FINCH, J.

Post v. Hover, 33 N. Y. 593, 597, 598; *Schettler v. Smith*, 41 id. 328, 345, 346; *Schuyler v. Schuyler*, 59 id. 426, 432.) As the trust provides for the liquidation of the whole estate, and the collection of the debts due from each child, to provide an income for testator's children during their lifetime, with remainder to their issue, and these objects being valid, plaintiff's action is not maintainable. (*Downing v. Marshall*, 4 Abb. Ct. App. Dec. 662; *Tiers v. Tiers*, 98 N. Y. 568; *Schuyler v. Schuyler*, 59 id. 426, 431, 432.) The clause authorizing a sale is imperative, and not a mere power, and is necessary to carry out the testatrix's intention of a complete liquidation and settlement of the estate. (Perry on Trusts, § 248.) The intention of the testatrix that the absolute ownership shall absolutely vest in each child's issue on and at the death of such child, is not only manifest from the terms of the will, but such has been the invariable legal construction of similar testamentary provisions, which also hold that the mere postponement of the enjoyment or payment in no wise impairs such a devise. (*Tucker v. Bishop*, 16 N. Y. 402, 405, 406; *Gilman v. Reddington*, 24 id. 9, 18; *Everitt v. Everitt*, 29 id. 39, 75; *Clancy v. O'Gara*, 4 Abb. N. C. 268; *Stevenson v. Lesley*, 70 N. Y. 512, 515; *Moore v. Little*, 4 id. 66; *Hoxie v. Hoxie*, 7 Paige, 187, 191; *Patterson v. Ellis*, 11 Wend. 260, 268; *Sheridan v. House*, 4 Abb. Ct. App. 218; *Roome v. Phillips*, 24 N. Y. 463, 465; Jarman on Wills, 2 R. & T.'s notes, 417, 418, and notes.) By the will the executors are empowered and directed to sell the premises in question, and there were and are, consequently, persons in being having the power to convey and dispose of the same. There is, therefore, no such suspension of the power of alienation as is forbidden by the statute. (2 R. S. [6th ed.] 1101, § 14; *Robert v. Corning*, 39 N. Y. 225, 235.)

FINCH, J. Margaret Van Brunt at her decease left eight children her surviving. Seven of the eight were married and had children of their own. By her last will some few specific

Opinion of the Court, per FINCH, J.

legacies were given, and then the balance of the estate was disposed of by a residuary clause upon the asserted invalidity of which this action is founded. By that clause the testatrix devised and bequeathed the whole of her estate, real and personal, to her executors in trust, to collect and pay over the rents, income and profits to her children in equal proportions during their natural lives, and after their decease to their respective wives or husbands during their lives or until they should remarry. Pausing at this point we find, as it respects each of the eight children, a trust for the life of such child, followed by a second life interest to the surviving wife or husband, as the case might be. It is conceded that, ordinarily and in the absence of qualifying expressions, the husband and wife referred to in the second limitation would be one living at the death of the testatrix, and so the limitation would run, in each part of the divisible trust, for two lives in being at its creation. But this construction is claimed to be inadmissible by reason of qualifying words contained in the devise and bequest of the remainder. The will proceeds: "If any of my children should die without issue, or without leaving a husband or wife him or her surviving, then I give, devise and bequeath his or her share to the survivor or survivors of them share and share alike." There is no defect in this limitation over of the remainder considered by itself, but the expression "a husband or wife" is alleged to reflect back upon the construction of the second life interest, and make that a limitation, not upon the life of the husband or wife in being at the decease of testatrix, but upon the life of any husband or wife whom a child should thereafter marry, who might be a person born after the death of the testatrix, and so not in being when the limitation was created. And this construction is said to be fortified by the next provision, which is this: "If he or she leave a husband him or her surviving, then I give, devise and bequeath his or her share to the survivor or survivors of my said children, share and share alike, *after* the decease or remarriage of said husband or wife." Here, it is argued, is distinctly manifested a purpose to post-

Opinion of the Court, per FINCH, J.

pone the vesting of the remainder in possession until the death of the first life tenant, and then until the death or remarriage of *any* husband or wife who may survive, and who might be a person both born and married after the death of testatrix. The final clause of the paragraph respects the contingency of children dying leaving issue and gives to them *per stirpes*, after the death or remarriage of their father or mother, their parent's share of the rents and profits during minority, and then their interest absolutely.

The next paragraph of the will reads thus: "I hereby authorize and empower my said executors, hereinafter named, at any time when in their judgment it may be advisable to do so, to sell any part or all of my said personal and real estate in the last preceding paragraph referred to, and invest the proceeds arising therefrom in some good, safe and sufficient security."

One of the children now brings this action for a partition, alleging that the whole trust is void because it suspends the absolute power of alienation for more than two lives in being at its creation; that the testatrix died intestate as to the whole residue beyond the specific bequests, and the plaintiff as heir-at-law is entitled to his proportion of the real estate.

To this complaint a demurrer was interposed on the ground that no cause of action was stated. The demurrer was sustained by the Special Term and that decision affirmed by the General Term. The conclusion reached went upon the ground that, whatever might be true of the limitations after the first life estate, the power of alienation was not suspended because of the authority to sell conferred upon the executors by the will.

We are not prepared to give our assent to the doctrine asserted, but without discussing that specific question, we think there is no difficulty in affirming the judgment, upon the ground that, irrespective of the power of sale, the trust is valid, and its limitations not too remote.

As we have said, the words husband and wife, as first used in the will, would naturally and ordinarily refer to a husband

Opinion of the Court, per FINCH, J.

and wife living at the death of the testatrix. That meaning, and the purpose evinced by it, ought not to be surrendered and changed with the consequence of a destruction of the trust, unless other language of the will clearly and unmistakably points to a different meaning, and establishes a different intention. The use of the indefinite article, and the expression, "a husband or wife," does not necessarily, or even fairly, indicate an intention to provide a second life interest in a wife or husband becoming such after the death of the testatrix. The phrase is not *any* husband or wife, but a husband or wife living at the death of the first tenant for life, and should be taken to refer to the same husband or wife provided for in the previous limitation. Seven such husbands and wives were in fact living when the will was made, and when the testatrix died, and it was for them that the devise was made; and if the testatrix had intended a formal provision for their possible successors after her death, we should expect to find some definite disclosure of that purpose, and not one dependent upon a mere inference from a form of expression which might very well not have been so intended. For the use of the indefinite article in the phrase, "a husband or wife," was occasioned by the existence of several such persons answering the description, to any one of whom the provision was intended to apply. It means, therefore, any one of the seven in being at testator's death, who might be living at a child's death, or leave issue upon his or her decease, and should not be held to include some husband or wife becoming such after the testatrix's death.

The case mainly relied upon by the appellant is that of *Schettler v. Smith* (41 N. Y. 328), but there the language of the will was different and provided for the unlawful limitation by expressions, definite and precise in their application, and which could bear no other meaning. The trust in that case secured a life interest to the son, John Jacob, and on his death to his wife, by a separate provision confined to them alone, although the son was unmarried, and it could have had

Opinion of the Court, per FINCH, J.

no possible application to a wife living at the testator's death, and must have contemplated an after marriage and provision for such a wife. Here, on the contrary, there are seven wives and husbands living at testator's death, to whom the limitation can apply, and was intended to apply, and we are asked to go beyond that application and construe it not only to reach a later wife of the one unmarried son, but also a possible second wife or husband of the married children. In the case cited the language creating the trust for another son, Lawrence, who was married, is still more decisive, for there added to the bequest to the wife of Lawrence, was the provision, "on her decease if he leave a *widow*, or, if he leave no widow, then on his decease, to convey," etc. The court very properly held that the use of the word "widow," plainly included any wife who might survive him.

It is true, as is conceded, that the trust in the present will is divisible into as many separate trusts as there are children. But in seven of them there was, in each case, a wife or husband living at the death of the testatrix, and within her knowledge and thoughts, and about those there is no serious question, and scant room for doubt that such and such only were the intended beneficiaries of the second life interests. We do not think the construction should be changed when we come to the case of the unmarried son, for, though the trust was divisible, it was created at once for all the children, and by a common description and expression.

But assuming the trust estates which precede the remainders to be valid, it is contended that such remainders to the grandchildren further suspend the power of alienation beyond a single minority. That contention proceeds upon the theory that the remainder does not vest until all the grandchildren in one of the trusts, who take their father's share, become of full age, and is founded upon the fact that they are to take *per stirpes*, and that they are to receive the income until of full age, "when their interest shall be given to them." But already, in previous provisions, the testatrix had declared that the remainders to her surviving children should vest at once

Opinion of the Court, per FINCH, J.

upon the termination of the precedent estates, and when she reaches the alternative of there being issue, her words are that said issue shall "represent" their parent, and when of full age "their interests shall be given to them." This language assumes in the grandchildren an existing "interest," the possession of which is postponed during minority, and the remainder in fee in each case vests in interest upon the termination of the precedent estates, the possession only being postponed; so that if, upon the death of testatrix, each minor grandchild then living took only a contingent future estate, yet, upon the death of its father and mother, the contingency disappeared and the estate vested at that date as a remainder in fee. (*Manice v. Manice*, 43 N. Y. 374.) It was distinctly held in that case that where nothing is interposed between the minor and his enjoyment of his estate except his own minority, the estate is vested. And the case becomes stronger when, during such minority, the accruing rents and profits are given to the minor. In such event the gift of the intermediate income indicates an intention to vest the *corpus* from which the income is to be derived. (*Robert v. Corning*, 89 N. Y. 225, 241.)

That the issue of each child were to take *per stirpes* does not make them joint tenants, and so interpose minorities other than their own. The phrase indicates that, as between them and the other grandchildren, they are to have exactly their parent's share, unaffected by their own number, but accomplishes no more than that. How, as between themselves, they take, is fixed by statute (1 R. S. 727, § 44), which makes them tenants in common in the absence of an express provision for a joint tenancy.

It follows, therefore, under this will that, upon the death of any child, and that child's husband or wife who was living at testatrix's death, the portion or share of such child vested at once in his or her children, each one of such children taking his or her proportion in fee, subject only to a postponement of possession during his or her minority, and to the execution of the trust upon the rents and profits during that period.

Statement of case.

(*Stevenson v. Lesley*, 70 N. Y. 517; *Embury v. Sheldon*, 68 id. 234.) There was, therefore, no possible suspension of the power of alienation beyond two lives in being at the death of the testatrix, and a single minority.

We think, therefore, that this will admits of a construction which preserves its dispositions and does not invalidate its limitations.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

THOMAS H. STRINGHAM, Respondent, v. HENRY HILTON et al.,
Executors, etc., Appellants.

A master is not bound to furnish the best of known or conceivable appliances; he is simply required to furnish such as are reasonably safe and to see that there is no defect in those which his employees must use.

The test is not whether the master omitted to do something he could have done, but whether, in selecting tools and machinery for the servant's use, he was reasonably prudent and careful, and whether those provided were, in fact, adequate and proper for the use to which they were to be applied. These rules are not violated when machinery reasonably safe is furnished by the master, but which becomes unsafe when negligently or carelessly used; and if the servant is injured because of such negligent use by a co-servant, the master is not liable.

When an appliance or machine, not obviously dangerous, has been in daily use for a long time, and has uniformly proved adequate, safe and convenient, its use may be continued without the imputation of negligence or carelessness.

In an action to recover damages for injuries received by plaintiff while employed in defendant's storehouse, it appeared that plaintiff was engaged in removing grain from the platform of a grain or freight elevator, when the engineer gave it an upward movement which continued until striking against a beam, the rope by which it was suspended broke and the platform fell to the ground floor carrying the plaintiff and inflicting the injuries complained of. The elevator, engine and appliance were proved to be of a kind commonly in use when they were put into the building, and also like those in common use in hotels, breweries, printing houses and public buildings. The motion of the elevator was entirely under the control of the engineer. The whole apparatus was put in under the direction of a manufacturer of many years experience,

111	188
119	125
111	188
121	212
111	188
123	644
111	188
125	54
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126	110
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142	34

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Statement of case.

who testified that he had hundreds of elevators then running similarly constructed for the carriage of freight and employes in charge; that they were put in, leaving a distance between the cross-beam of the elevator and the pulley beam above it, varying from six inches to three feet, a short distance being safer when the elevator was operated with a double rope as was the case here. This elevator had been in use for two years before the accident and was continued in use for several years down to the time of the trial without causing other harm and without complaint, and there was nothing to show that when used with ordinary and reasonable care any harm could result from it. *Held*, the evidence failed to establish a cause of action; and that plaintiff was not entitled to recover. *Also, held*, that the injuries having been caused by the act of the engineer, plaintiff's co-servant in starting the elevator, the master was not liable for the improper performance of his duties.

(Argued October 3, 1888; decided November 27, 1888.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made July 23, 1886, which affirmed a judgment in favor of plaintiff entered upon a verdict, and affirmed an order denying a motion for a new trial

This action was brought to recover damages for injuries received by plaintiff while employed in the storehouse on the farm of Cornelia M. Stewart, deceased, defendant's testatrix, through the fall of an elevator therein. Pending the appeal to this court the defendant died and the action was revived and continued against her executors. The case is reported on a former appeal to this court in 100 New York, 516.

Horace Russell for appellants. The master is not required to use the latest or the best appliance. (*Burke v. Witherbee*, 98 N. Y. 562.) It is not sufficient to authorize the submission of a fact to the jury that there is a "scintilla of evidence," a mere surmise to the contrary. (*Dwight v. Ger. L. Ins. Co.*, 103 N. Y. 341.) The fact that the elevator had been operated two years before this accident, and afterwards for eight years, up to the time of the trial, without harm to any one, relieved defendant from any imputation of culpable imprudence or carelessness in using it. (*Laflin v. B. & S. R. R. Co.*, 106 N. Y. 141; *Burke v. Witherbee*, 98 id. 563; *Devlin v. Smith*, 89 id. 470, 476.)

Statement of case.

Charles C. Smith for respondent. The defendant was responsible for the negligence, carelessness and omissions of duty of her agent and superintendent. (*Fuller v. Jewett*, 80 N. Y. 46; *Corcoran v. Holbrook*, 59 id. 517; *Plank v. N. Y. C. & H. R. R. Co.*, 60 id. 607.) While the master has the right to use whatever machinery, mode or method he chooses to adopt in the prosecution of his business, and does not guarantee the safety of those in his employment, still he is bound to supply them with suitable and safe machinery and appliances, materials and accommodations, with sufficient and competent co-workers, and to make and promulgate adequate rules and regulations for the conduct of his business in its ordinary run, and for any extraordinary occasion that may be reasonably anticipated. (*Gibson v. P. R. R. Co.*, 46 Mo. 163; *Shear & Redf. on Neg.* [4th ed.] §§ 187, 189, 194, 202, 203; *Marshall v. Stewart*, 33 Eng. L. & Eq. 1; *Stringham v. Stewart*, 100 N. Y. 516; *Slater v. Jewell*, 85 id. 61, 67; *Murphy v. B. & A. R. R. Co.*, 88 id. 146; *Painton v. N. C. R. R. Co.*, 83 id. 7; *Sheehan v. N. Y. C. & H. R. R. Co.*, 91 id. 334; *Ellis v. N. Y., L. E. & W. R. R. Co.*, 95 id. 546; *Pantzar v. T. F. Mfg. Co.*, 99 id. 368; *Thomp. on Neg.* 972, 973.) If the defendant knew, or would have known with reasonable care and precaution, that there were defects or deficiencies in the construction of the elevator, and its operating machinery and appliances, from which danger was apprehended or was liable to occur, it was her duty to exercise diligence and to adopt precautionary measures to protect those in her employment from perils of which they were ignorant, and had no reason to anticipate. (*Shear & Redf. on Neg.* [4th ed.] §§ 202, 203; *Dana v. N. Y. C. R. R. Co.*, 92 N. Y. 639; *Patterson v. Wallace*, 1 Macq. 748; *Walsh v. Peet Valve Co.*, 110 Mass. 23; *Coombs v. N. B. Cord Co.*, 102 id. 572; *Huddleston v. Lowell Ma. Shop*, 106 id. 282, 285; *Whart. on Neg.* § 212; *Beach on Contrib. Neg.* 372.) Ordinary care implies such watchfulness and precaution as are proportioned to the danger to be avoided, measured by the standard of common prudence and experience. (*Kain v.*

Statement of case.

Smith, 89 N. Y. 375, 384; *DeGraaf v. N. Y. C. & H. R. R. Co.*, 76 id. 125, 130; *Smith v. Dock Co.*, 3 Law Rep. 6, 326.) It did not vary the circumstances or limit the ground of liability, because a particular part of the elevator merely was deficient in its structure, or ill proportioned and contrived, if the defendant knew that by reason thereof, and as it was used and employed by her workmen in the usual course of her business, it was dangerous and unsafe and liable to injure them, and took no measures to advise them of the peril, and made no provision for their security. (Thomp. on Neg. 980-983, and notes; *Shear & Redf. on Neg.* [4th ed.] §§ 189, 190, 194, 196, 202, 203; *Avilla v. Nash*, 117 Mass. 318; *Paulimes v. E. R. R. Co.*, 34 N. J. L. 131.) The master is chargeable with knowledge of the probable consequences of acts which he directs or of which he is cognizant — or should, by the exercise of reasonable care and precaution, have been cognizant — and it is his duty to point out to the servant latent dangers of which he is ignorant. (Thomp. on Neg. 980, 992, 996, and notes; *Perry v. Marsh*, 25 Ala. 650, 657; *Williams v. Ulough*, 3 H. & N. 758; *Laning v. N. Y. C. R. R. Co.*, 49 N. Y. 521, 532; *O'Donnell v. Alleghany V. R. R. Co.*, 19 Week. Dig. [Ct. of App.] 414; *Vosburgh v. L. S. & M. R. R. Co.*, 94 N. Y. 374, 378; *Beach on Contrib. Neg.* 361; *Shear & Redf. on Neg.* §§ 194, 197, 203, 214.) In allowing plaintiff to use the elevator and to work on and around it, without any notice that he incurred any risk or danger in so doing, there was not only an implied but a direct assurance that it was adapted to and suitable and safe for him in the performance of his duty. (*Swords v. Edgar*, 59 N. Y. 28.) Plaintiff was justified, in the absence of any notice or knowledge to the contrary, in relying upon the care of his employer, and to rest in the assurance that she had taken proper precautions for his safety, and to assume that his fellow servants were competent and careful. (Thomp. on Neg. 980; *Shear & Redf. on Neg.* [4th ed.] §§ 91, 92, 212, 217; *Swords v. Edgar*, 59 N. Y. 28; *Kain v. Smith*, 89 id. 375; *Beach on Contrib. Neg.* §§ 95, 96; *U. S. Rolling Stock Co. v. Wilder*,

Statement of case.

5 N. E. Rep. 92.) He did not assume or undertake, impliedly or otherwise, the risk of any negligence on the part of defendant that he was ignorant of, did not comprehend and had no reason to anticipate. (Shear & Redf. on Neg. [4th ed.] §§ 92, 185, 187, 188, 190, 198, 216, 217; Thomp. on Neg. 973, and notes; Beach on Contrib. Neg. 362; *Ford v. F. R. R. Co.*, 110 Mass. 240; *Cone v. D., L. & W. R. R. Co.*, 81 N. Y. 206; *Stringham v. Stewart*, 100 id. 516; Pierce on Railroads, 379.)

A. H. Dailey for respondent. If the negligence of the master and co-servant co-operate in producing the injury to a servant, the master will be liable if he has omitted any part of the obligations imposed upon him by law; for instance, if he omits to exercise reasonable care and prudence in furnishing safe and suitable appliances for the use of his servants. (*Stringham v. Stewart*, 100 N. Y. 516, 526; *Fuller v. Jewett*, 80 id. 46; *Cone v. D., L. & W. R. R. Co.*, 81 id. 209; *Ellis v. N. Y., L. E. & W. R. R. Co.*, 95 id. 546; *Pantzer v. Tilly Foster M. Co.*, 99 id. 368; *Lilly v. N. Y. C. & H. R. R. Co.*, 107 id. 566.) Care must be exercised commensurate with the danger to which a party is exposed, but the degree of care necessary to be exercised on a particular occasion is, generally of necessity, a question of fact. (*Stackus v. N. Y. C. R. R. Co.*, 79 N. Y. 464, 466; *Kain v. Smith*, 89 id. 375, 384.) Plaintiff having been directed by his superior to use the implement, whether, under these circumstances, he should be charged with knowledge and negligence, by reason of it, was for the jury. (*Gibson v. E. R. Co.*, 63 N. Y. 449; 20 Am. Rep. 552; *Abrahams v. Reynolds*, 5 H. & N. 143; *Senior v. Ward*, 1 E. & E. 385; *Hutchinson v. N. Y. N. & B. R. R. Co.*, 5 Exch. 343-354.) The fact that the elevator had struck before, and the defendant's superintendent knew there was danger, and gave plaintiff no warning, was negligence on his part. (Thompson on Neg. 994; *Chapman v. E. R. Co.*, 55 N. Y. 584; Cooley on Torts, 555-567; *Courtney v. Cornell*, 49 N. Y. Supr. Ct. 286; *Green v. Banta*, 48 id. 156; *Holden v. F. R. R. Co.*, 129 Mass. 268; *Coombs v. N. B.*

Opinion of the Court, per DANFORTH, J.

Cord Co., 102 id. 572; *Patterson v. Wallace*, 1 Macq. 747; *Huddleston v. Lowell Machine Shop*, 106 Mass. 282.) The servant does not accept risks latent in his employment, but it is the master's duty to inform him of them. (Wharton on Neg. §§ 210, 211; *Clarke v. Holmes*, 7 II. & N. 937, 943; *Ryan v. Fowler*, 24 N. Y. 410; *Cone v. D., L. & W. R. R. Co.*, 81 id. 206.) The fact that the wire broke placed the burden upon defendant of showing that in its selection and in its continued use reasonable prudence and care were exercised. (*Filke v. B. & A. R. R. Co.*, 53 N. Y. 549; *Pantzar v. T. F. Min. Co.*, 22 N. Y. Week. Dig. 117; 3 Macq. 275; 2 id. 34; 49 N. Y. 522; *Booth v. B. & A. R. R. Co.*, 73 id. 40; *Corcoran v. Holden*, 59 id. 518.) The plaintiff properly relied upon the natural and legal obligation of the defendant to discharge her duty and not place him in a position of peril without due notice to him, and failing in that duty she becomes liable in damages for his injuries. (Sherman on Neg. § 395; *Ernst v. H. R. R. Co.*, 37 Barb. 292; *Mackey v. N. Y. C. R. R. Co.*, 35 N. Y. 75; *Newson v. N. Y. C. R. R. Co.*, 29 id. 383; *Booth v. B. & A. R. R. Co.*, 73 id. 36; *Russell Mfg. Co. v. N. J. Steamboat Co.*, 50 id. 121.)

DANFORTH, J. The parties were master and servant; the latter, in the course of his employment received an injury, for which he brought this action. He has recovered damages against the exception of the defendant to the submission of any question to the jury, and the judgment in his favor should stand if there is evidence which, upon any just construction, tends to show that the defendant had committed any negligence to give occasion to the hurt. If not, the law affords to the plaintiff no remedy.

It appeared that the defendant was the owner of a large farm, and, in connection with it, a storehouse, having therein an elevator moved by steam, and operated through an engine controlled by an engineer. The plaintiff was in her employ as a laborer, and while in the warehouse removing grain from

Opinion of the Court, per DANFORTH. J.

the platform of the elevator, it was given an upward movement which continued until, striking against a beam, the rope by which it was suspended broke, and the platform fell to the ground floor, carrying the plaintiff, and hence his injury.

Did this happen by reason of any defect in the original construction or its subsequent condition, or through the negligence of the engineer in operating the machine? Upon the first branch of this question the learned trial judge instructed the jury that "the defendant had a right to use in her storehouse any elevator and operating machinery she chose, provided she exercised reasonable care and prudence in having them safe and suitable; that she was not bound to use the most approved machinery or appliances in that business," and, as to the question in hand he said, "if the machine was insecure through carelessness on the defendant's part, she would be liable, but that the operating of the machine was strictly the duty of a fellow servant, and for negligence on his part she was not responsible." The action upon a former appeal was before this court (100 N. Y. 516), but upon a different record. We were then bound by a concession which narrowed the issues to those relating to contributory negligence on the plaintiff's part, and excluded any discussion as to the negligence of the defendant to furnish safe and adequate machinery for the performance of the work in question. Moreover, the facts established upon the trial since had, and to review which the appeal is taken, makes this a new case by presenting, for our determination, the very question then withheld, and which upon the former trial was left unanswered, the defendant on that occasion making no attempt to establish the safety of the elevator, but relying for a defense upon testimony tending to show that in using it the plaintiff was a mere volunteer, taking upon himself the risk of injury, and by his own conduct contributing thereto. As to that ground the defendant is silent. Upon the other, the one now presented, we think the appeal should succeed. The complaint charges that the elevator and

Opinion of the Court, per DANFORTH, J.

machinery were defective in their construction, in that they were unprovided with proper appliances for safety and were insecure and unsuited for the purpose to which they were applied, and, moreover, that the engineer was incompetent to perform the duties assigned to him. No fault is now found with the capacity or skill of the engineer, and the argument in behalf of the respondent and the printed briefs submitted in his behalf, attribute the accident to a defective machine or appliance, first, in failing to have a proper space overhead; second, in failing to have any safety clutches or automatic appliance to guard against the fall of the elevator if the rope broke; or, third, a device by which the engineer could ascertain where the elevator actually was in relation to the floor at which he wished it to stop. On the other hand, negligence and want of care on the defendant's part, in regard to the machine or any of its appliances, is denied, and the accident attributed to a mistake or error of the engineer in the management of his engine.

The verdict, in view of the judge's charge above quoted, shows that the jury were of the opinion that the machine was defective in its construction, or that it had become defective by reason of the owner's want of care. Is there any evidence to support that finding? We find none. There is no ground for an apprehension even that the machine or its appliances had been impaired by use, or that, for any reason, it was less safe or efficient than at first. Something is, indeed, said by one witness as to the rope showing signs of wear or abrasion, but the rope did not break where such condition appeared, nor in the course of its ordinary and proper use, but because it was exposed to an unnatural tension, in resisting, while checked by the pulley-beam, the whole power of the engine. If there was any defect it must have been in its original construction. Against that supposition the evidence is all one way. A master is not bound to furnish the best of known or conceivable appliances; he is required to furnish such as are reasonably safe (*Burke v. Witherbee*, 98 N. Y. 562; *Probst v. Delamater*, 100 id. 266), and to see that there is no defect in

Opinion of the Court, per DANFORTH, J.

those which his employes must use. (*Gottlieb v. Railroad Co.*, 100 N. Y. 462.) The test is not whether the master omitted to do something he could have done, but whether, in selecting tools and machinery for their use, he was reasonably prudent and careful; not whether better machinery might not have been obtained, but whether that provided was in fact adequate and proper for the use to which it was to be applied. These rules are not violated when such machinery becomes unsafe, only when negligently or carelessly used. (*King v. R. R. Co.*, 66 N. Y. 181; *S. C.*, 72 id. 607.)

The machinery consisted of an elevator, an engine and its appliances. They were conclusively proven to be of a kind very commonly in use when the one in question was put in, constituting, indeed, the ordinary and customary form of grain or freight elevators, and in frequent and common use in hotels, breweries, printing-houses and public buildings. The engine was a single cylinder, ten-horse power, link motion, operated by the use of the lever in starting and stopping, and also with a throttle valve similar to that of a locomotive, operated by the engineer. It was placed by the side of the elevator, rigged with a double rope of wire, which led directly from the elevator to the drum. The engineer's place was at the engine facing the drum, and by his evidence and that of others, it appears that its motion was entirely and easily under his control. He could stop the elevator at any point he chose by using the lever or throttle valve, and the rope was marked with white paint to indicate the different floors at which it might be required. The whole apparatus, was put in under the direction of a competent manufacturer of many years experience, who testified — and of that there was no contradiction — that he had hundreds then running, similarly constructed, for the carriage of freight and employes in charge of it, among others, miners, "lifting," he says, "thousands per day." They were put in leaving a distance between the cross-beam of the elevator and the pulley beam above it, varying from six inches to three feet. The greater distance was the safest, but a short

distance, when there was a double rope, was safer than a greater distance with a single rope. And, having regard to a freight elevator, as distinguished from a passenger elevator, the witness for the plaintiff declares that one so constructed and tended, was "the usual method and safe." The space between the elevator and the beam above was in this instance eight inches, but all agree that operated as this was with a double rope, sixteen inches of rope must pass around the drum to raise the elevator to the beam. The elevator was intended as a freight elevator only; it had a platform but no sides. It had been in use since 1879, and for two years at least before the accident, causing no harm and complained of by no one. The same machine was continued in use for several years afterwards, and down to the time of the trial with no different result, and there is nothing to show that, when used with ordinary and reasonable care, there was any reason to suppose harm or mischief could result from it. This fact brings the case directly within the rule that when an appliance or machine not obviously dangerous has been in daily use for a long time, and has uniformly proved adequate, safe and convenient, its use may be continued without the imputation of imprudence or carelessness.

Assuming the plaintiff's relation to the elevator to have been that of a passenger, he had ceased to be one at the time of the accident. He was going neither up nor down, nor was he intending to do either. He had been carried safely from the basement to his destination, a track or landing seven feet above the second floor, and thirty feet from the place from which he started; he there got off on the landing. It is obvious that there he was perfectly safe, as safe as he could have been in any part of the building. He was on a floor and off the elevator and outside of it. He was there as an employe, dealing with a quantity of oats in a car, and whether he came there by the elevator or the stairs could have made no difference. It was his duty as a servant to remove the car from the elevator, and he was engaged in the performance of that duty. He stood on the edge of the landing and was pushing the car from the

Opinion of the Court, per DANFORTH, J.

elevator. His body, therefore, was, in fact, over the elevator, his feet upon the floor or landing, his hands having hold of the car. What then happened with which the construction of the elevator had anything to do? Nothing.

Asked by his counsel "What is the reason you didn't get it" (the car) "off," he answered: "He" (the engineer) "started up too quick." The elevator was perfectly secure except for that act of the engineer. But that act cannot be so construed as to imply a defect in the condition of the machine, or negligence in the master who furnished it, relying upon the co-servant's reasonable care in its use. The machine was started by means of the lever, which was intended to serve that purpose. It could have been stopped within the space of an inch before it had moved half an inch. Why did he start it and why didn't he stop it? Because he either heard or supposed he heard a signal to raise the elevator to a higher floor, or because through inattention or carelessness he moved the lever without a signal and without reflecting that it could have no occasion to go higher. Risk of danger from this source was a risk incident to the plaintiff's service. It was the act of a co-servant, done within the range of a common employment. As to this, also, it is apparent that whether the space between the position of the elevator and the beam above it had been six inches or three feet, could have made no difference. The engineer started to go to another floor, in his mind to go seven feet and upward; there was no such floor. The plaintiff was not negligent, but his co-servant was. The act causing his injury pertained to the duty of his co-servant, and the master is not liable for its improper performance. One who engages in work with others takes the chances, not only of his own negligence, but of the negligence of which his fellow-servants may be guilty; and it is as well settled as any rule can be that he cannot recover from the common master, damages in respect to the negligence of the fellow-servant any more than for damages arising from his own want of care.

In *McCooker's Case* (84 N. Y. 77), the yard master negligently at the wrong moment signalled to the engineer to back

Statement of case.

his train, and, as a consequence, the plaintiff's intestate was killed; a recovery in his favor was reversed upon the principle on which the rule referred to stands. Many other cases might be cited, but it is unnecessary. The plaintiff has failed to make his case an exception to that rule, and the judgment in his favor should be reversed and a new trial granted, with costs to abide event.

All concur, except Ruger, Ch. J., not voting.

Judgment reversed.

111	199
120	204
111	199
124	435
124	659

ISABELLA C. HOAG, as Administratrix, etc., Appellant, v.
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD
COMPANY, Respondent.

R., plaintiff's intestate, was riding on a public highway with her husband, who was driving. In attempting to cross defendant's tracks at a crossing they were both killed by a collision with a passing train. In an action to recover damages, it appeared that at this crossing, in the absence of obstructions, a train upon the freight track, which came first, or upon the passenger track which was seventy feet distant from the freight track, was visible for a distance of one or two miles. In approaching the freight track the husband stopped his horse when a hundred or more yards away and then again within fifteen yards of the crossing on account of the passage of a freight train. As soon as it had passed he crossed the freight track, and, in an endeavor to cross the passenger track, the collision occurred. There was no proof as to the manner of the accident except that the horse was seen jumping to get across and did, in fact, escape. The plaintiff was nonsuited. *Held*, error; that if the husband was negligent, his negligence could not be imputed to the wife; that while she had no right, because her husband was driving, to omit reasonable and prudent effort to see for herself that the crossing was safe, she was not bound to suspect a purpose on the part of her husband to cross until she saw it being executed; that the presumption was they both saw the approaching train, and she was not blamable in thinking and expecting he would stop again; that when she saw he was about to make the attempt to cross, as they must have been then very close to the track, she was not bound to jump from the wagon, seize the reins or interfere with the driver; that even if she did not entreat him to stop, but sat silent, it does not follow, as matter of law, that she was negligent, as she might

Statement of case.

not have had time or might have been paralyzed from fright, and the question was one of fact for a jury.

The degree of care to be exercised in order to avoid the charge of negligence varies with the circumstances and the emergencies.

(Argued October 3, 1888; decided November 27, 1888.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made February 3, 1885, which affirmed a judgment entered upon an order nonsuiting plaintiff on trial.

This action was brought to recover damages for alleged negligence, causing the death of Rebecca M. C. Hetrick, plaintiff's intestate.

The facts are substantially stated in the opinion.

G. L. Stedman for appellant. The court erred in nonsuiting plaintiff, whether plaintiff's intestate used the degree of care necessary being a question for the jury. (*Stackus v. N. Y. C. & H. R. R. Co.*, 79 N. Y. 464; 89 id. 308, 311; *Massoth v. D. & H. C. Co.*, 64 id. 529; *Hart v. H. R. Bridge Co.*, 80 id. 622; *Kellogg v. N. Y. C. & H. R. R. Co.*, 79 id. 72; *Shaw v. Jewett*, 86 id. 616.) It is not to be assumed that the deceased did not look or listen. (*Smedis v. Bklyn & R. R. Co.*, 88 N. Y. 13; *Greany v. L. I. R. R. Co.*, 101 id. 419.) Although plaintiff's negligence may, in fact, have contributed to the accident if the defendant could, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him. (*Green v. Erie R. Co.*, 11 Hun, 334; *McCall v. N. Y. C. R. R. Co.*, 54 N. Y. 642; *Gorton v. Erie R. Co.*, 45 id. 660.) The negligence of the husband was not to be imputed to the wife. (*Platz v. City of Cohoes*, 26 Hun, 391; 89 N. Y. 219; *Robinson v. N. Y. C. R. R. Co.*, 66 id. 11; *Dyer v. Erie R. Co.*, 71 id. 228.) The omission of the customary signals was an assurance by the company to the plaintiff that no engine was approaching within a quarter of a mile on either side of the crossing; on this he was entitled to rely, and to the defendant he owed no duty of further

Statement of case.

inquiry. (*Beiseigle v. N. Y. C. R. R. Co.*, 34 N. Y. 633; *Ernst v. H. R. R. Co.*, 39 id. 61; 35 id. 9; *Sherry v. N. Y. C. & H. R. R. Co.*, 104 id. 455.)

Hamilton Harris for respondent. There being no evidence whatever that the deceased was not guilty of negligence, and the only inference to be drawn logically from the undisputed facts being that she was guilty, there was no question for the jury. (*Connelly v. N. Y. C. & H. R. R. Co.*, 88 N. Y. 346; *Smith v. N. Y. C. & H. R. R. Co.*, 19 W'kly Dig. 230; *Becht v. Corbin*, 92 N. Y. 658.) A person approaching a railroad track must look and listen, and is excusable for the omission only when the circumstances show that both precautions were impossible or unavailing. (*Woodard v. N. Y., L. E. & W. R. R. Co.*, 106 N. Y. 369; *Young v. N. Y., L. E. & W. R. R. Co.*, 107 id. 500.) The burden was upon the plaintiff of showing affirmatively, either by direct evidence or from circumstances, or both, that the deceased was without fault and approached the crossing with prudence and care and with senses alert to the possibility of approaching danger. (*Tolman v. S. B. & N. Y. R. R. Co.*, 98 N. Y. 198.) There being no witness of the accident to entitle the plaintiff to recover, she was bound to show affirmatively by circumstances that the deceased exercised proper care for her own safety, and if the circumstances point just as much to negligence on her part as to its absence, or point in neither direction, plaintiff could not recover and was properly nonsuited. (*Cordell v. N. Y. C. & H. R. R. Co.*, 75 N. Y. 330.) As plaintiff's evidence showed contributory negligence on the part of the deceased and her husband jointly, and they were so connected in their action, the negligence of the husband was chargeable to the deceased. (*Donnelly v. B. C. R. R. Co.*, 109 N. Y. 16.) Even in the case of a gratuitous ride upon the invitation of another, where the negligence of the driver may not be imputable to the passenger, the law does not release the passenger from the exercise of due care for

Opinion of the Court, per FINCH, J.

himself. (*Cosgrove v. N. Y. C. & H. R. R. Co.*, 87 N. Y. 88; *Dyer v. Erie R. Co.*, 71 id. 228; *Smith v. N. Y. C. & H. R. R. Co.*, 38 Hun, 33; *Allyn v. B. & A. R. R. Co.*, 105 Mass. 77.)

FINCH, J. The husband and wife were both killed by collision with a passenger train while attempting to cross the defendant's track at a crossing known as Fuller's lane. The husband was driving, and his wife, for whose death this action was brought, was riding with him on the way to their home. At this crossing the passenger and freight tracks were seventy feet apart. To the deceased and her husband, who were approaching from the north, the freight tracks were the first to be crossed. At that crossing, and all the way to the passenger tracks, a train upon them was visible, without anything to obstruct or hinder for a distance of at least one, and possibly of two miles. The husband, when approaching the freight tracks, stopped his horse when a hundred or more yards away, and then again within fifteen yards of the crossing, because of the passage of a freight train which obstructed the way. When that had passed they crossed the freight tracks in its rear, and, in an endeavor to cross the passenger tracks, were struck by a train and killed. Nothing is known of the manner of the accident, except that the horse was seen jumping to get across and did, in fact, escape. On this state of facts the plaintiff was nonsuited, and that judgment affirmed by the General Term.

If we assume, for the purposes of the argument, the negligence of the husband who was driving, yet his negligence cannot be imputed to the wife. (*Platz v. Cohoes*, 26 Hun, 391; affirmed, 89 N. Y. 219; *Robinson v. N. Y. C. R. R. Co.*, 66 id. 11.) The question presented as to her is, whether there was any evidence tending to show that she was free from negligence contributing to the injury. The facts and circumstances proven admit of two conflicting inferences, one or the other of which must be true. The deceased and her husband either saw the passenger train approaching as they neared the

Opinion of the Court, per FINCH, J.

track, or they did not. If they did not see it, or, at least, the deceased did not see it, she was negligent, for she was bound to look and listen, and the facts show that if she had looked, she could have seen, and would have seen, the approaching train. She had no right, because her husband was driving, to omit some reasonable and prudent effort to see for herself that the crossing was safe. But the strong probability is that she did see the train, and her husband did also, and that he, for some reason, undertook to cross in its front, miscalculating, perhaps, its distance and speed and his opportunity. She was not bound to suspect that purpose until she saw it being executed. Before that she might reasonably expect him to stop and wait. When she saw that he was about to make the attempt they must have been very close to the track. She was not bound to jump from the wagon. That might seem to her as dangerous as to sit still. She could not be required to seize the reins or interfere with the driver. That is almost always dangerous and imprudent. She might have begged her husband to stop, and we do not know that she did not, but if she did not and sat silent it does not follow, as matter of law, that she was negligent. Her husband seems to have been ordinarily a careful man. Having his wife with him, one would think, would make him more so. He stopped twice before he crossed the freight tracks. She was hardly blamable, when both saw the coming train, for thinking and expecting that he would stop again. When she saw that, instead of stopping, he meant to cross, she should have spoken, perhaps, but she may have been so near the engine as to have scarcely had time, or so paralyzed with fright at the impending danger as to have lost her judgment and prudence for the moment. The degree of care to be exercised varies with circumstances and emergencies. If the deceased was silent, it does not follow, as matter of law, that she was negligent. Which of the two inferences we have named should be drawn, and, if the latter, whether the surrounding circumstances sufficiently show that the deceased was not in fault, were questions which, we think, should have gone to the jury.

himself. (*Cosgrove v. N. Y. C.*
88; *Dyer v. Erie R. Co.*, 7
H. R. R. Co., 38 Hun,
105 Mass. 77.)

FINCH, J. The husband
collision with a passenger train
defendant's track at a crossing
husband was driving, and
was brought, was riding
At this crossing the passenger
feet apart. To the defendant
approaching from the north
to be crossed. At that time
passenger tracks, a train was
to obstruct or hinder the
of two miles. The husband
tracks, stopped his horse
and then again within
of the passage of a
When that had passed
rear, and, in an endeavor
struck by a train
manner of the accident
ing to get across and
facts the plaintiff was
by the General Term.

If we assume, for the
negligence of the husband
cannot be imputed to
391; affirmed, 89 N. Y.
Co., 66 id. 11.) The
there was any evidence
negligence contributing
stances proven admit
other of which must
either saw the passenger.

Statement of case.

ant before the surrogate and the accounting could have been enforced. (S. 92, § 52 *et seq.*) She could have proceeded by action for a simple accounting or for payment of the legacies, and could have included therein a prayer that if the personal property was insufficient the executrix should be compelled to exercise the power of sale of the real estate under by the will, and with the proceeds pay such legacies. The six years limitation, however, applied to all these remedies, as equity follows the law in cases of concurrent jurisdiction of the two courts, and when the remedy at law is as effectual as the equitable one the legal statute of limitation applies to the remedy in equity. In cases of action in which, before the adoption of the Code of Procedure of 1848, the subject was the same at law and in equity, and the remedy only was different, were not included within the ten years limitation (§ 71), but were provided for by the sections preceding limiting actions at law. Thus the ten years limitation applied only to cases over which equity had, before the Code, exclusive jurisdiction.

Butler v. Johnson (44 Hun, 206) reversed.

Argued October 4, 1888; decided November 27, 1888.)

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department, made July 1, 1886, which reversed a judgment of the Special Term in favor of defendant and ordered a new trial. (Reported below, 14 Hun, 206.)

This action was brought by plaintiffs, who claimed, as purchasers of real estate, of which William P. Johnson died seized, to restrain defendant, as executrix of the will of said Johnson, from selling said real estate to pay debts and legacies. Said testator died June 21, 1871, leaving a will, which, with various codicils, were admitted to probate June 28, 1871.

The material provisions of the will are as follows:

"*First.* I do hereby devise and bequeath unto my wife, Julia Ann Johnson, and my daughter, Mary Butler, wife of George Butler, all my estate, both real and personal, in trust for the purposes hereinafter particularly mentioned, with full power and authority in them, or the survivors of them, to sell, dispose of and convey the same, and any and every part thereof, for the execution and carrying into effect the trusts and provisions of this my last will.

"*Second.* It is my will, and I do hereby order and direct, that the said trustees above named, or the survivors of them,

Statement of case.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur, except EARL and GRAY, JJ., not voting, and PECKHAM, J., not sitting.

Judgment reversed.

CHAUNCEY S. BUTLER et al., Respondents, v. JULIA A. JOHNSON as Executrix, etc., Appellant.

Although a creditor of an estate was not bound, as the law stood in 1872, to institute proceedings to compel the sale of real estate to pay debts until after an executor or administrator had rendered an account, such omission did not stop the running of the statute of limitations as against the debt.

An executor or administrator is bound to set up the bar of the statute of limitations, and has no authority to allow a claim so barred.

As against an estate, therefore, a debt barred by the statute is to be regarded as no debt.

Where an executor, having a power of sale of the testator's real estate, to pay debts, is taking steps to execute the power for the purpose of paying debts which are outlawed, those who have succeeded to the testator's title may maintain an action to restrain such sale, as it would place a cloud upon their title.

J. died June 14, 1871, leaving a will which was admitted to probate June 28, 1871. By the will the executrix was authorized to sell the real estate to pay debts. In 1883 defendant, as executrix of J., upon application of a legatee and certain simple contract creditors, published a notice of sale of said real estate to pay said legatee and creditors. The accounts of said executrix had never been judicially settled. In an action brought by grantees of the heirs-at-law to restrain such sale, *held*, that both the legacy and debts were barred by the statute of limitations prior to the time the Code of Civil Procedure went into effect, and so were not revived by the provision of that Code (§ 1819), declaring that, for the purpose of computing the time within which a cause of action may be commenced by a legatee against an executor to recover a legacy, the cause of action is deemed to accrue when the executor's account is judicially settled; and that the action was maintainable by plaintiffs.

It seems the legatee could have asked the surrogate to decree payment of the legacy by the executrix, which decree could have been enforced if there were assets. (2 R. S. 90; § 45; *id.* 116, § 18.) After the expiration of eighteen months she could have cited the executrix to

111 204
118 150
119 220

111 204
132 376

111 204
136 423

111 204
139 221

111 204
146 143

111 204
152 585

111 204
158 822

111 204
172 16

Statement of case.

account before the surrogate and the accounting could have been enforced. (2 R. S. 92, § 52 *et seq.*) She could have proceeded by action for a simple accounting or for payment of the legacies, and could have included therein a prayer that if the personal property was insufficient the executrix should be compelled to exercise the power of sale of the real estate given her by the will, and with the proceeds pay such legacies. The six years limitation, however, applied to all these remedies, as equity follows the law in cases of concurrent jurisdiction of the two courts, and when the remedy at law is as effectual as the equitable one the legal statute of limitation applies to the remedy in equity.

Causes of action in which, before the adoption of the Code of Procedure of 1848, the subject was the same at law and in equity, and the remedy only was different, were not included within the ten years limitation (§ 71), but were provided for by the sections preceding limiting actions at law. *It seems* the ten years limitation applied only to cases over which equity had, before the Code, exclusive jurisdiction.

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The material provisions of the will are as follows:

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"*Second.* It is my will, and I do hereby order and direct, that the said trustees above named, or the survivors of them,

Statement of case.

shall keep, retain and enjoy the possession of my estate and property, and carry on and continue the same business in which I am engaged and pursuing at the time of my death until my youngest daughter shall arrive to the age of twenty-one years; or in case of her death before arriving at that age, then until she would have arrived at the age of twenty-one if she had so long lived; and in case my trustees shall continue said business as aforesaid, I hereby direct that the net profits arising from such business shall be devoted to the payment of my just debts by my executors. And I further will and direct that in case my said trustees, or the survivors of them, shall deem it best for the interest of my said wife and children to sell and convey the whole, or any part of my estate, before the time my youngest daughter will arrive at the age of twenty-one years, then and in that event my said trustees, or the survivors of them, may sell and convey the whole, or any part of my said estate, at any time they may see fit and proper to do so.

“Third. I do hereby order and direct my said trustees above named, or the survivor of them, to pay and discharge all my just debts from the income and avails of my estate, and if it shall be necessary to sell or mortgage any part of my estate to raise money for the payment of my said debts, then, and in that case, I hereby empower and authorize said trustees, or the survivor of them, to sell and convey or mortgage so much, or such part or parts of my said estate as may be necessary for the payment of said debt.

“Fourth. I do hereby further will, order and direct that, after the payment of my just debts, and after the time my youngest daughter will arrive at the age of twenty-one years, my said trustees above named, or the survivor of them, shall invest so much of my estate on bond and mortgage upon unincumbered real estate as shall be necessary to produce an income of one thousand dollars annually, as and for an annuity, to be paid over to my said wife in semi-annual payments of five hundred dollars each, during the time she shall remain my widow, or unmarried, and which said bequest or annuity is

Statement of case.

hereby declared to be in lieu of all dower or right of dower of the said Julia Ann Johnson in or to my said estate, and every part thereof.

"Fifth. I give and bequeath to my daughter Mary Butler, wife of George Butler, the sum of five hundred dollars; to Emma Jane Darrow, daughter of my said wife by a former husband, the sum of one thousand dollars; to William E. Darrow, the husband of said Jane Darrow, the sum of one thousand dollars; and to George Tunnicliff, the sum of one thousand dollars, the husband of Arlina Melvina Johnson, my daughter. And in case either of the above named legatees shall die without lawful issue, then his or her said legacy shall be and belong to the residuary of my estate hereinafter mentioned; and in case either of said last mentioned four legatees shall make any claim against my estate for services or otherwise, then said legacy to them respectively, the said legatee making any such claim shall forfeit all right and claim to his or her legacy as aforesaid.

"Sixth. I further will and declare that if my youngest daughter, Louisa Amelia Johnson, shall arrive to the age of twenty-one years, then and in that case the several and respective legacies mentioned in this will shall not become due or payable until the expiration of one year after my death, and without interest, except the annuity to my said wife as aforesaid, of which the first half year's payment shall be due and payable to her at the end of six months after my decease.

"Seventh. I give and bequeath the residue of my estate and property to my daughters, Mary Butler, Harriet H. Carey, Arlina Melvina Tunnicliff and Louisa Amelia Johnson, all the residue and remainder of my estate to be equally divided between them, share and share alike; and in case either of them shall die without lawful issue, the share or portion of any so dying shall go to and belong to the survivor or survivors of said residuary legatees and their issue lawfully begotten."

At the testator's death he owed debts to Amasa Abbott, Harriet Conkling and Nicholas Vrooman, who presented their

Statement of case.

claims pursuant to notice, published by Julia A. Johnson, as executrix, who alone appears to have qualified and acted; these claims were accepted by her, and these are the only unpaid claims against the estate.

On March 23, 1882, the residuary legatees and devisees divided the estate between them. Tunnicliff, Carey and Blake conveyed to Mary J. Butler the lands described in the complaint, and other lands, which she accepted as her share, and she, on the same day, conveyed to Tunnicliff, Carey and Blake the remainder of the estate, they agreeing to pay all of the liabilities of the estate. The defendant received from Tunnicliff, Carey and Blake, a mortgage, in consideration of which she released her claim upon the estate for her annuity, and by which mortgage the mortgagors agreed to pay Mary J. Butler \$4,166.66 at the death of the defendant. Part of the real estate deeded to Tunnicliff, Carey and Blake has been sold under mortgages given to secure the testator's debts, and the remainder under mortgages given by the testator in his lifetime. Tunnicliff, Carey and Blake are insolvent. The plaintiffs in this action have acquired title to the real estate described in the complaint by conveyances from Mary J. Butler, and her grantees; they purchased with knowledge of the situation of the estate. The defendant's accounts have not been settled before the surrogate. In 1881 Emma J. Darrow filed a petition in the Surrogate's Court for an order compelling the payment of her legacy. Allen Bloomfield, to whom Abbott, Conkling and Vrooman had assigned their claims, joined in the petition, and asked that the above and certain other debts contracted by the executrix in the management of the estate, be paid. The surrogate decreed that all of the debts and the legacy should be paid by Julia A. Johnson and Mary J. Butler, out of the assets in their hands. Mary J. Butler appealed to the Supreme Court, where the surrogate's decree was reversed as to her. February 21, 1883, the defendant advertised to sell, at public auction, the premises described in the complaint, acquired by the plaintiffs from Mary J. Butler, to satisfy the debts of her testator and the aforesaid decree of the surrogate.

Statement of case.

The plaintiff began this action for a perpetual injunction restraining the sale of the premises. The trial court held that the legacy of Mary J. Darrow, and the debts of the intestate, were a lien and charge upon the real estate, and that it could be sold under the power of sale contained in the will, but restrained the sale until the accounts of the defendant should be judicially settled by the surrogate. The court further held that the debts contracted by the defendant as executrix were not a lien upon the real estate, and that it could not be sold for their payment. No costs were given. The plaintiffs appealed from that part of the judgment providing that defendants may sell their real estate for the payment of Mary J. Darrow's legacy, and the testator's debts above enumerated.

J. A. Lynes for appellant. Section 1819 of the Code of Civil Procedure was a substitute for and took the place of the other statute as to claims for payment of legacies or distributive shares where they were not already barred. (*In re Thompson*, 26 W. D. 172; *In re Vandyke*, 25 id. 177; *Quackenbush v. Quackenbush*, 3 N. Y. S. R. 755; *Watson v. R. R. Co.*, 93 N. Y. 522.) An action to compel the payment of a legacy may be brought within ten years. (*Scott v. Stebbins* 27 Hun, 335; 91 N. Y. 605; *Shannon v. Howell*, 36 Hun, 47; *Salisbury v. Morse*, 7 Lans. 359; 55 N. Y. 675; *Edmunds v. Diefendorf*, 5 Barb. 398.) The statute of limitations, applies to "actions" for payment of a legacy in Surrogate's Courts. (*In re Vandyke*, 25 Week. Dig. 177.) By the law, as it stood in 1872, the holder of claims against an estate was not bound to institute proceedings for their payment until after the executrix had rendered an account, and the statute did not begin to run until such accounting was had. (Laws of 1837, chap. 460, as amended; Laws of 1843, chap. 172; Laws of 1847, chap. 298; 3 R. S. [5th ed.] 196, § 59; *Skidman v. Romain*, 2 Bradf. 122.) A creditor might, at any time, institute compulsory proceedings to procure a decree

Statement of case.

from the surrogate to sell the real estate of a decedent to pay his debts, but not until after an accounting by the executor or administrator before the surrogate. (3 R. S. [5th ed.] 196, § 59; Dayton on Surrogates [3d ed.], 623; *Ferguson v. Broome*, 1 Bradf. 10.) If the remedy of the legatee and creditors had become or was unavailing, then they could resort to their action in equity to compel payment and foreclose their lien. (*Quackenbush v. Quackenbush*, 3 N. Y. S. R. 755, 757.)

F. G. Fincke for respondents. The claims of the creditors and legatee of the testator are barred by the statute of limitations. (*Sharp v. Freeman*, 2 Lans. 171; 45 N. Y. 802; *Raynor v. Gordon*, 23 Hun, 264; *McCartee v. Camel*, 1 Barb. Ch. 455; *Smith v. Remington*, 42 id. 75; *Am. Bible Soc. v. Hebbard*, 51 id. 552; 41 N. Y. 619, note; *Clark v. Ford*, 1 Abb. Ct. App. Dec. 359; *S. C.*, 3 Keyes, 370; *Loder v. Hatfield*, 71 N. Y. 92.) The statute of limitations runs against the execution of a mere power in trust, and may be interposed in favor of an heir or devisee. (*Dickinson v. Teasdale*, 31 Beav. 511; 1 De Gex, J. & S. 52; *Coope v. Creswell*, L. R., 2 Ch. App. Cas. 112.) The rule formerly prevailing in equity by which no statute of limitations was applicable in suits of equity for certain causes of action, is revoked and annulled by the statute. (*Loder v. Hatfield*, 71 N. Y. 93, 104; *De Pierres v. Thorn*, 4 Bosw. 283, 289; *Salisbury v. Morss*, 7 Lans. 359; 55 N. Y. 675; *Rundle v. Allison*, 34 id. 180, *Peters v. Delaplaine*, 49 id. 363; *Hubbell v. Sibley*, 50 id. 468.) Where there is a legal remedy, or where the remedies in law and equity are concurrent, equity follows the law, and the legal limitation applies, and not the equitable. (*Loder v. Hatfield*, 71 N. Y. 92; *Borst v. Corey*, 15 id. 505; *Rundle v. Allison*, 34 id. 180; *Kane v. Bloodgood*, 7 Johns. Ch. 90, 125; *Murray v. Coster*, 20 Johns. 570; *Gallatin v. Cunningham*, 8 Cow. 360; *Humbert v. Trinity Church*, 24 Wend. 587; *Bertine v. Varian*, 1 Edw. Ch. 343; *Renwick v. Renwick*, 1 Bradf. 234.) Any person interested in the estate as heir, devisee, legatee or creditor may, without the concurrence of the executor, interpose

Opinion of the Court, per PECKHAM, J.

the statute of limitations as a defense to a claim brought against the estate. (*Partridge v. Mitchell*, 3 Edw. Ch. 180; *Sherwen v. Vanderhost*, 1 R. & M. 347; *Kendrick's Estate*, 15 Abb. N. C. 189; *Warren v. Paff*, 4 Bradf. 260; *Sharp v. Freeman*, 45 N. Y. 802; *Visscher v. Wesley*, 3 Demarest, 301; *Mooers v. White*, 6 Johns. Ch. 360; *Bloodgood v. Bruen*, 8 N. Y. 362; *Buckle v. Chapin*, 1 Lans. 443; *Burnett v. Noble*, 5 Redf. 69.) The court, at General Term, was right in holding that the appellant could not and should not voluntarily execute the power of sale for the payment of debts and legacies which could not be enforced by reason of the lapse of time. (*McClaren v. McMartin*, 36 N. Y. 88, 91; *Visscher v. Wesley*, 3 Demarest, 301; *Wilson v. Wilson*, 2 id. 462; *Burnett v. Redfield*, 5 Redf. 69; 33 How. 449; 3 Abb. [N. S.] 345; *Richard v. Williams*, 7 Wheat. 113; *Barnard v. Onderdonk*, 98 N. Y. 159; Perry on Trusts [2d ed.] 417.) A legacy is not a debt, and land, charged with the payment of legacies, is not charged with the payment of debts. (*In re Dolan*, 88 N. Y. 309; *Hetzel v. Barber*, 69 id. 13.) A power to sell real estate to pay debts does not include a power to sell to pay legacies. (*Russell v. Russell*, 36 N. Y. 581.)

PECKHAM, J. The debts were barred by the statute of limitations at the time the defendant commenced her advertisement of her intended sale of the real estate of the plaintiffs for the purpose of paying them. They were simple contract debts, and became outlawed, at most, in six years after the expiration of eighteen months from the death of the testator.

Even though a creditor of an estate was not bound, as the law stood in 1872, to institute proceedings to compel the sale of real estate to pay debts until after an executor or administrator had rendered an account, such omission did not stop the running of the statute as against the debt. (*Raynor v. Gordon*, 23 Hun, 264.) The executor or administrator could institute such proceedings for three years, and during or after that time could be compelled by the creditor so to do, provided the administrator had rendered an account. (*Ferguson*

Opinion of the Court, per RECKHAM, J.

v. *Broome*, 1 Bradf. 10.) This was a remedy open to a creditor to enforce the collection of a debt, but it did not enlarge the time for the running of the statute against it.

An executor or administrator is bound to set up the bar of the statute, and he would not be allowed in his accounting any sum paid upon a debt which, at the time of its payment by him, was barred by such statute. (*Bloodgood v. Bruen*, 8 N. Y. 362; *Bucklin v. Chapin*, 1 Lans. 443, 448; *Burnett v. Noble*, 5 Redf. 69.)

As against an estate, therefore, a debt barred by the statute must be regarded as no debt. There is not only no moral obligation to pay it, but, on the contrary, there is a duty to set up the bar of the statute resting upon the executor or administrator.

The debts in this case, therefore, constituted no legal claim against the estate, and could form no foundation for the proposed exercise by defendant of the power to sell real estate for the payment of debts given her by the will. It is not pretended that at this time she had any other power. We have no doubt that the six years statute applies to the debts at all events.

In regard to the legacies, the question is more troublesome. The defendant says the cause of action for the recovery of the legacies was not outlawed, because the legatee had a right, under 2 Revised Statutes, 114, section 9, to commence an action to compel the executrix to exercise her power of sale of the real estate under the will, and with the proceeds pay her legacies, and that such cause of action was of an equitable nature; that such a cause of action did not become barred until the lapse of ten years, which had not passed when the Code of Civil Procedure took effect, in September, 1880, and that the limitation prescribed in that Code then became applicable, and under that limitation the cause of action against the executrix does not accrue until her accounts are judicially settled. (Code of Civil Pro. § 1819.) It is admitted that her accounts have never been thus settled. All this reasoning depends upon the question whether the action

Opinion of the Court, per PECKHAM, J.

to recover payment of the legacy was outlawed by the six years statute, which had run before the adoption of the Code of Civil Procedure in 1880. If it had it was not revived by that Code.

After the death of the testator, and when the payment of the legacies became due, the legatee had several remedies to obtain such payment. She could have asked the surrogate to decree payment of them to her by the executrix, and payment could have been enforced if there were assets, and in this respect the real estate must under the will be regarded as assets. (2 R. S. 90, § 45; *id.* 116, § 18.) She could also, after the expiration of eighteen months, have cited the executrix to account before the surrogate, and an accounting could have been enforced. (2 R. S. 92, § 52 *et seq.*) She could also have proceeded by action for a simple accounting or for payment of the legacies, or she could have included in such action a prayer for relief that if there were not enough personal property to pay the legacies, the executrix should be compelled to exercise the power of sale of the real estate given her by the will, and with the proceeds pay such legacies. The six years statute applied to all these remedies, for they were of a legal nature, excepting the last. If there had been no other remedy than such last-mentioned one, it is plain the ten years statute would apply. The claim is made, upon the part of the plaintiff, that the subject-matter of such a suit, the cause of action, is the recovery of payment of the legacy, and that all these various modes of obtaining payment thereof are simply different remedies to attain the same object, and that when such is the case, and the two courts under the old system of law and equity had concurrent jurisdiction over the subject-matter or cause of action, and the remedy at law was as effectual as the equitable one, the legal statute of limitations applied to the remedy in equity, and if the cause of action were barred at law, it was equally so in equity. This was the rule in the days before the adoption of the Code, and plaintiffs claim that it still exists. All the relief obtainable by action, in the nature of a suit in equity by the legatee herein, could have been obtained by an

Opinion of the Court, per PECKHAM, J.

action of a purely legal nature during six years. The proceedings before the surrogate were entirely adequate to obtain payment of the legacies. Under the will the real estate would be treated as assets for the purpose of selling it to pay the legacies. The rule of limitation, that equity follows the law, in cases of concurrent jurisdiction of the two courts, was not brought into being by the Revised Statutes. In *Hovender v. Lord Annesley* (2 Sch. & Lef. 607), Lord Chancellor REDESDALE stated: "But it is said that courts of equity are not within the statutes of limitation. This is true in one respect. They are not within the words of the statutes, because the words apply to particular legal remedies. But they are within the spirit and meaning of the statutes and have been always so considered. I think it is a mistake in point of language to say that courts of equity act merely by *analogy* to the statutes. They act in *obedience* to them; the statute of limitations applying itself to certain legal remedies for recovering the possession of lands, for the recovery of debts, etc., and equity which in all cases follows the law, acts on legal titles and legal demands, according to matters of conscience which arise and which do not admit of the ordinary legal remedies. Nevertheless, in thus administering justice according to the means afforded by a court of equity, it follows the law. * * * I think, therefore, courts of equity are bound to yield obedience to the statute of limitations upon all legal titles and legal demands, and cannot act contrary to the spirit of its provisions. I think the statute must be taken virtually to include courts of equity, for when the legislature by statute limited the proceedings by law in certain cases, and provided no express limitation for proceedings in equity, it must be taken to have contemplated that equity followed the law, and, therefore, it must be taken to have virtually enacted, in the same cases, a limitation for courts of equity also."

Chancellor KENT said, in commenting upon the language of the court in the above case, that it meant that if the party had a legal title and a legal right of action, and, instead of proceeding at law, resorted to equity — instead of bringing his

Opinion of the Court, per PECKHAM, J.

action of account or detinue or case for money had and received at law, he files his bill for an account, the same period of time that would bar him at law would bar him in equity. (*Kane v. Bloodgood*, 7 Johns. Ch. 89.)

When the same subject-matter of the demand in equity can also be made the subject of an action at law, the rule of analogy applies with all its force. (*Kane v. Bloodgood*, *supra*.)

In *Murray v. Coster* (20 Johns. 575, 585) the same rule was announced by the Court of Errors.

The Revised Statutes (2 R. S. 301, art. 6, §§ 49-51) enacted the same rule, and, in cases of concurrent jurisdiction, the legal limitation was applied. The revisers, in their notes to these sections, stated that no new rule was intended, but the sections adopted the language of the Court of Errors in the case of *Murray v. Coster* (*supra*). In truth, the Revised Statutes simply enacted the then existing law on that subject. The Code of 1848 (Laws of 1848, 511, § 66) repealed the provisions of the Revised Statutes as to limitations upon the time for the commencement of actions other than for those relating to real property, and substituted provisions of its own on that subject. Provision being made in other sections for many cases, it was enacted by section 77 of that Code that "an action for relief, not hereinbefore provided for, must be commenced within ten years after the cause of action shall have accrued."

The claim is now made that, by this repeal of the Revised Statutes upon the subject of the limitation of actions and by the adoption of affirmative provisions on that subject by the Code, the old rule under discussion has been abolished and does not now exist; that it was repealed in terms and has not been re-enacted.

In *Eoder v. Hatfield* (71 N. Y. 92, 104) the question is mooted by FOLGER, J., but not discussed. In *Salisbury v. Moss* (7 Lans. 359), the learned judge writing the opinion stated his conviction that the rule was abrogated by the Code and had never been re-enacted. The point was not necessary to the decision of the case, but it appears that it is one of some doubt, or, at least, open to a possible variety of views.

Opinion of the Court, per PECKHAM, J.

The argument urged is, that the Code, in terms, has repealed the statute, and it has not been re-enacted; that it was inappropriate to the new system under which all actions were to be prosecuted in the same forms and before the same tribunals, whether they were to enforce legal or equitable rights, and, for that reason, it became necessary that changes should be made in the provisions of the statutes concerning the time limited for their commencement; that, in such changes the provision relating to concurrent jurisdictions was omitted, and that prescribing the time in which actions for relief could be brought was re-enacted, subject to the single exception including certain actions for relief on account of fraud.

The argument, it must be conceded, is quite strong. The effect of it would, however, be to lengthen, by four years, the time in which many actions could be commenced, which, under the old rule, would have been limited to six, and in actions, too, where no reason can be given for such a change. We think that in causes of action which, before the adoption of the Code the two courts had concurrent jurisdiction over, or, in other words, where the subject of the action was the same in both courts, and the remedy only was different, such actions are included in and provided for by the sections preceding the above-mentioned seventy-seventh section, and hence are not included in that section as within the ten years statute. The simple repeal of those sections of the Revised Statutes relating to the commencement of actions would not have made any alteration in the law applicable to these causes of action, over which the two courts had theretofore had concurrent jurisdiction, for, as we have seen, the law was the same before their enactment. We must look further and see if the Code has provided any rule on this subject which is at war with the law as it stood before it was adopted. We do not think it has. Those sections which precede the seventy-seventh, wherein the time for the commencement of actions of what would theretofore have been called a legal nature, is prescribed, must be taken to include causes of action over which courts of equity had theretofore had concurrent juris-

Opinion of the Court, per PECKHAM, J.

diction with courts of law, because, as was said by Lord REDESDALE, in the case of *Hovenden v. Annesley* (*supra*), the legislature must be taken to have contemplated the rule then existing, that equity followed the law in such cases, and to have virtually enacted for them the same limitation. This would leave the seventy-seventh section to apply to all cases over which equity had theretofore had sole jurisdiction, where no other rule had been specifically provided for one or more of such cases.

When the legislature prescribed, for instance, six years in which to commence an action upon a liability or obligation, express or implied, we think it meant to include in such description an action which might formerly have been prosecuted in either court, upon or by reason of such obligation, and where the remedy would have been adequate in either, and if the form of the remedy chosen were such as would formerly have been cognizable in chancery, yet the limitation applicable to the remedy at law would apply. There can be no sense in enlarging the time by a mere change of the form of the remedy sought, where the subject matter of the action is precisely the same, and the remedy in either was adequate.

This holding retains the application of the statute to a number of cases which, before the adoption of the Code, had been limited to six years, and where no good reason can be suggested for lengthening such time to ten years.

The question whether the Code has altered this old rule does not seem to have been heretofore decided by this court. In *Borst v. Corey* (15 N. Y. 505), the old rule was enforced because the cause of action arose prior to the Code, yet nothing in the opinion intimates that there was any change effected by the Code. The same may be said of *Clarke v. Ford* (3 Keyes 370.) In *Rundle v. Allison* (34 N. Y. 180), it seems to have been assumed that the old rule still existed, and no discussion is had regarding it, although the cause of action in that case arose subsequent to the adoption of the Code.

The present case seems to demand its decision, and we hold

Opinion of the Court, per PECKHAM, J.

as already indicated. It thus appears that although the form of the remedy against the executrix, by commencing an action to compel her to exercise her power of sale given by the will, is of an equitable nature, and if it had been the only remedy the ten years statute would apply, yet, as there had been several other equally efficient remedies of a legal nature to collect the legacies, the legal statute applies to the equitable remedy, and hence, at the time of the adoption of the Code of Civil Procedure the claim of the legatee, by reason of the non-payment of the legacies, was barred, and there was, therefore, no legal demand against the estate at that time either for the payment of debts or legacies.

The further question now arises whether the plaintiffs have a cause of action against the defendant and a right to come into court and ask for an injunction restraining her further proceedings towards such sale, when the foundation of the right rests upon the proposition that there are no legal claims against the estate, and that again depends upon the barring of such claims by setting up the statute of limitations against them. Can the defendant be prevented from voluntarily doing what no creditor or legatee could now compel her to do?

Assuming that the claims are outlawed and that the executrix, if sued by the creditors of the estate or by the legatee, could successfully interpose the bar of the statute to the maintenance of such suit or of any proceeding against her, can these plaintiffs properly enjoin the defendant from taking steps to voluntarily pay debts which are thus outlawed?

We think, they can, as it is the duty of an executrix to set up the bar of the statute; she is guilty of a breach of her duty in taking any steps towards the payment of debts which are outlawed, and hence are no valid claims against the estate. And if her proceedings are continued to a sale and a conveyance by her under such sale and in assumed execution of her power of sale created by the will, it is apparent that a cloud will be placed upon the title to the property owned by the plaintiffs and of which they are in possession. In taking proceedings under such circumstances to prevent the further action of the

Opinion of the Court, per PECKHAM, J.

defendant which would otherwise result in placing such a cloud upon the title to their property, we think the plaintiffs do not run counter to any principle or decision holding the general view that the statute of limitations can only be used as a shield and not as a sword.

Under the facts of this case, where it appears to be the duty of defendant to contest these very claims on the ground that they are barred, and where in such case she substantially acts as a representative of those who own the real estate, bound in the discharge of her duty to set up the bar, and where, instead of so doing, she violates her duty as a *quasi* trustee and takes steps towards selling such real estate and towards placing a cloud upon the title of those who own it, and whose interests therein it is her duty to protect, we think that the plaintiffs have a right to ask the aid of the court to prevent this substantial trustee from violating her duty and from placing this cloud upon their title, even though in so doing the plaintiffs necessarily use the statute of limitations as the foundation of their claim; under such circumstances the bar of the statute is simply a defense to the affirmative and improper proceedings of the defendant, and is not an attack upon any right of a third person.

We admit the general rule as stated by the learned judge who wrote at Special Term, but think this case is no violation thereof.

We think the order of the General Term reversing the judgment of the Special Term was right, and should be affirmed, and judgment absolute granted against the defendant with costs, in accordance with her stipulation.

All concur, except EARL, J., taking no part.

Order affirmed and judgment accordingly.

Statement of case.

In the Matter of Proving the Will of WILLIAM COLEMAN,
Deceased.

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Where the probate of a will is contested on the ground of the unsoundness of mind of the testator, a physician who has attended upon the deceased in a professional capacity, is not a competent witness for the contestants to testify from knowledge acquired while so attending him as to his mental incapacity. (Code of Civil Pro. § 884.)

The prohibition of the Code of Civil Procedure (§ 885), against the disclosure by an attorney of a communication by his client to him or his advice thereon, in the course of his professional employment, applies to instructions given, by one proposing to execute a will, to an attorney employed to draw it, and to conversations had with the attorney for the purpose of enabling him to carry out the instructions.

Where, however, the attorney is requested by the testator to sign the attestation clause of the will as witness thereto, this is an express waiver within the meaning of said Code (§ 886) of the pledge of secrecy so imposed and authorizes the disclosure.

The provision of the Code authorizing such a waiver by the client does not require it to be in writing or in any particular form or manner or at any particular time or place; it must be an express waiver made in such a manner as to show the testator intended to exempt his attorney, in the particular case, from the prohibition.

A testator, in requesting a person to sign, as a subscribing witness to his will, is presumed to know the obligations assumed by the witness in respect to the proof of the will; among other things, the duty to testify as to the circumstances attending its execution, including the mental condition of the testator at that time, as evidenced by his action, conduct and conversation.

The act of a testator, therefore, in requesting his attorney, who drew his will, to become a witness to it, is clearly indicative of an intention to waive the statutory prohibition, and so leave the witness free to perform the duties of the office assigned him.

(Argued October 4, 1888; decided November 27, 1888.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, made June 29, 1885, affirming a decree of the surrogate of Washington county.

The nature of the action and the facts, so far as material, are set forth in the opinion.

James C. Rogers for appellant. The testator was not, at the time the will was executed, of sufficiently sound mind and

Statement of case.

memory to render it valid. (*Clark v. Clark*, 1 Paige, 171; *Delafield v. Parish*, 25 N. Y. 25-105; *Forman v. Smith*, 7 Lans. 443; *Dumond v. Kiff*, Id. 465, 467; *Van Guysling v. Van Kuren*, 35 N. Y. 70; *Kinns v. Johnson*, 60 Barb. 69.) The testimony of the family physicians was competent. (*Staunton v. Parker*, 10 Hun, 55; *Steele v. Ward*, 40 id. 555; *Pierson v. People*, 76 N. Y. 424; 77 id. 564; *Parish Will Case*, 25 id. 115.) The testimony of Mrs. Coleman, the executrix of the will and devisee under it was competent, her testimony as to personal transactions and communications with her husband not having been given in her own behalf or interest, but directly against her interest. (*Ely v. Clark*, 19 Hun, 37; *Hill v. Alvord*, Id. 77; *Pursell v. Fry*, id. 595; *Smith v. Meaghan*, 28 id. 423, 425; *Talbot v. Talbot*, 23 id. 17-21; 1 Greenl. on Ev. § 410; *Clark v. Vorce*, 19 Wend. 232; *Smalley v. Smalley*, 1 Am. Pro. R. 566; *Whelpley v. Loder*, 1 Dem. 378.) The testimony of two out of three of the subscribing witnesses, who were proponent's counsel in the case, as to his communications with them and their advice, was incompetent. (Code, § 835; *Bacon v. Frisbe*, 15 Hun, 26; *S. C.*, 80 N. Y. 394; *Root v. Wright*, 84 id. 72; 18 id. 550; 56 id. 632; *Loveridge v. Hill*, 96 id. 222; *Westover v. Aetna Life Ins. Co.*, 99 id. 56; *Renihan v. Dennin*, 103 N. Y. 573; *People v. Murphy*, 101 id. 126; Reviser's note to section 836 in Throop's Code.) Very slight evidence of the improper exercise of undue influence between parent and child is required. (*Mowry v. Silver*, 2 Bradf. 133; *Forman v. Smith*, 7 Lans. 443; *Sears v. Shafer*, 6 N. Y. 268-272; *Rollwagen v. Rollwagen*, 63 id. 504.)

A. D. Wait for respondent. The court erred in allowing the testator's widow to testify as to the character of the sickness with which he was afflicted about five years before his death, the manner in which it commenced and in which he was affected. (*Holcomb v. Holcomb*, 95 N. Y. 316, 324, 325; *Lane v. Lane*, Id. 494, 501, 502.) Where the change of

Opinion of the Court, per RUGER, Ch. J.

testamentary intention is made upon a reason satisfactory to the testator, it furnishes no ground for setting aside the will, although the reason may seem unjust to a court investigating the question. (*Horn v. Pullman*, 72 N. Y. 270, 276, 278.) There was a total failure of proof sufficient to avoid the will on the ground of undue influence. (*Clapp v. Fullerton*, 34 N. Y. 190, 196, 197; *Horn v. Pullman*, 72 id. 269, 278; *In re Martin*, 98 id. 193; *Hewlett v. Elmer*, 103 id. 161; *Hebbard v. Haughian*, 70 id. 62; *Sheridan, as Executor, v. Houghton*, 16 Hun, 628; *In re Will of Chapman*, 27 id. 573; *In re Will of Chase*, 41 id. 204.) The communications testified to by the attorneys of the testator, who signed the will as subscribing witnesses, as made to them by the testator, were not such as an attorney or counselor is prohibited from disclosing under section 835 of the Code. Under the issue of fraud, imposition and undue influence raised by contestant, they were clearly competent and admissible as a part of the *res gestæ*. (*Clapp v. Fullerton*, 34 N. Y. 190, 194, 195; *In re Freeman*, 46 Hun, 458, 463; *In re Ross*, 87 N. Y. 514.) The contestants, Mrs. Coleman and Seeley, were not competent witnesses as to personal transactions and conversations between them and testator. (Code, § 829; *Schoonmaker v. Wolford*, 20 Hun, 166; *Snyder v. Sherman*, 23 id. 139; *Lane v. Lane*, 95 N. Y. 494, 501.) This court will not reverse such a decree for an error in the admission or rejection of evidence, "unless it appears to the court that exceptant was necessarily prejudiced thereby." (Code, § 2545; *Horn v. Pullman*, 72 N. Y. 269; *Brick v. Brick*, 56 id. 144; *In re Ross*, 87 id. 514; *Snyder v. Sherman*, 88 id. 656.)

RUGER, Ch. J. The probate of the will of William Coleman, deceased, was contested before the surrogate by his widow and several of his children and grandchildren, upon the ground that he was not of sound mind and memory at the time of its execution, and its execution was procured through undue influence, fraud and intimidation exercised over him by Robert S. Coleman. The will was admitted to probate, and the decree was affirmed upon appeal by the General Term.

Opinion of the Court, per RUGER, Ch. J.

It is urged, upon this appeal, that the evidence produced before the surrogate by the contestants, as to the mental and physical weakness and incompetency of the testator to make a valid will, is so strong and conclusive, that this court should reverse the decision of the court below upon the facts.

It is not our purpose to go into a detailed history of the evidence, or comment upon the weight and force of the various facts and circumstances proved on the trial by the respective parties, to sustain their several positions, as it is not even claimed by the appellants, that there was no evidence to support the decree of the surrogate. Their utmost contention is that the evidence is so persuasive and convincing, either of the mental incompetency of the testator or of the exercise of undue influence by the proponent in procuring the execution of the will, that the court should hold, as matter of law, that it was error for the surrogate to admit it to probate.

The argument of the appellants is based, to a large extent, upon evidence which was admitted on the trial against the objection of the proponent, and which we deem to be clearly inadmissible. While we consider the case made by the contestants upon the evidence to be strong, and as presenting a serious question whether the testator was competent to make a valid will or not, yet the exclusion of the evidence improperly received on their behalf by the surrogate, would impair the force and strength of their case, and leave the evidence as to the testator's competency more nearly balanced than it would otherwise be.

A general outline of the facts will be sufficient to present the views we deem it necessary to express upon the determination of this appeal. Robert S. Coleman, the only son of the testator, was the proponent of the will and one of the three executors named therein; the others having renounced or declined to act in that capacity. The testator, at the time of its execution, was upwards of eighty years of age, and died within a year thereafter. He was then possessed of property mainly consisting of real estate, of the value of about \$40,000, and had several children and grandchildren who were in needy

Opinion of the Court, per RUGER, Ch. J.

circumstances, partially dependent upon him for support, but were not mentioned in or provided for by the will, although apparently the natural objects of his bounty. That instrument, after making slight provisions for two of his grandchildren, gave his personal property, together with a life estate in his homestead, to his widow, and the remainder thereof, together with a remainder in the homestead, to the proponent. Robert was by profession a lawyer, and, although living in his father's family and being supported by him until he was nearly forty years of age, had never rendered material assistance to the testator, in his business affairs and was not apparently regarded by him with favor, or as a proper or fit person to have the management and control of business, such as that in which the testator had theretofore been engaged.

Upon the trial much evidence was given on both sides in regard to the mental and physical condition of the testator during the three or four years preceding his death; but no direct evidence was produced as to any effort, on the part of the proponent, to procure the making of a will by his father, or to influence or dictate the nature of its provisions. The proof, on the part of the contestants, as to the exercise of undue influence, is based wholly upon inference sought to be drawn from the apparently unfriendly relations existing between the testator and his son; the alleged unnatural and inequitable disposition of the property, the advanced age of the testator and the absence of any apparent reason, except the assumed existence of some extraneous influence, for excluding the other children from a share in his estate. There was much evidence produced by the contestants as to the impairment of the mental and physical condition of the testator subsequent to 1877, when it was claimed that he had experienced a paralytic affection, which caused a gradual but continuous impairment of his faculties, down to the time of his death in April 1881.

This evidence was met on the part of the proponent by nearly an equal number of witnesses, who testified to facts and circumstances showing the continued mental soundness of the

Opinion of the Court, per RUGER, Ch. J.

testator's faculties, and his capacity to transact business affairs until after the execution of the will.

The evidence on the part of the contestants is subject to the criticism that much of it was given under the objection of the proponent, and was of doubtful admissibility upon the questions litigated. Aside from the evidence of Mrs. Coleman, the most material and important facts on the part of the contestants were undoubtedly proved by the witnesses, Mrs. Seelye, the daughter of the testator, and the two physicians, Drs. Clark and Little, who testified to the unsoundness of mind of the testator during the year 1877 and subsequent thereto, from knowledge acquired by them while attending him respectively in a professional capacity. This evidence was duly objected to by the proponent, but was admitted against such objection. So far as the evidence of the medical witnesses is concerned, there can be but little doubt of its inadmissibility, and it should have been disregarded by the surrogate in determining the question of the testator's mental and physical condition. It seems to us that this evidence falls clearly within the prohibition contained in section 834 of the Code, as illustrated and applied in recent decisions of this court. (*Grattan v. Met. Life Ins. Co.*, 80 N. Y. 296; *Edington v. Mut. Life Ins. Co.*, 67 id. 185; *Westover v. Aetna Ins. Co.*, 99 id. 56; *People v. Schuyler*, 106 id. 318; *Renihan v. Dennin*, 103 id. 574.)

It is perhaps not important that we should comment upon the propriety of the rulings on the trial in reference to the evidence on the part of the contestants, since, in any event, whether it be considered or not, we are of the opinion that the question of the testator's mental condition, and the exercise of undue influence over him, in respect to the execution of the will, was one of fact to be determined by the trial court. Whatever may be said of the evidence, we are clearly of the opinion that not only was there evidence upon which the decision of the surrogate could properly be supported; but there was no such preponderance as to the testator's mental

Opinion of the Court, per RUGER, Ch. J.

incapacity to make a valid will, as would have authorized a reversal by an appellate tribunal of the surrogate's decree determining that fact in favor of the proponent. (*In re Ross*, 87 N. Y. 514; *In re Cottrell*, 95 id. 333; *Hewlett v. Elmer*, 103 id. 161.)

The most material question in the case arises over the exception taken by the contestants to the admission of the evidence of the witnesses Hughes and Northrup, as to conversations had by them, respectively, with the testator at the time of receiving instructions in reference to a draft of the will offered for probate, and another drawn about two years previously by the same attorneys. The testimony given by these witnesses was undoubtedly very material and important in its bearing upon the issue tried, and if erroneously admitted would lead to a reversal of the judgment appealed from.

The evidence showed that the witnesses were a firm of lawyers, residing at Sandy Hill, and were employed by the testator in their professional capacity to draw such wills, and that the conversations testified to, were had with them for the purpose of enabling them to execute the instructions of the testator. That these interviews were had in pursuance of and under the sanction of a professional employment, and that communications made by a client under such circumstances to his attorneys, were clearly within the protection of the statute, we have no doubt. (*Westover v. Aetna Ins. Co.*, *supra*; *Renihan v. Dennin*, *supra*; Code of Civil Pro. § 835.)

The prohibition of the statute, therefore, applies to these communications, and they were inadmissible as evidence unless brought within the provisions of section 836, authorizing their disclosure. By that section the pledge of secrecy imposed by the statute is to be observed, unless its provisions "are expressly waived" by the client. There is nothing in this section requiring the waiver to be made in writing, or in any particular form or manner, or at any particular time or place; but it is required to be an express waiver, and made in such manner as to show that the testator intended to exempt the witnesses, in the particular instance, from the prohibition

Opinion of the Court, per RUGER, Ch. J.

imposed by the statute. An examination of the will itself, as well as the evidence of all of the witnesses present on the occasion of its execution, concur in establishing the fact that the testator requested both Hughes and Northrup to sign the attestation clause of his first as well as of his second will, as witnesses thereto. That request implies not only information as to the necessity of such signatures to the validity of the instrument executed, but also knowledge of the obligations which they assumed in respect to the proof thereof after his death. He must have been aware that his object in making a will might prove to be ineffectual unless these witnesses could be called to testify to the circumstances attending its execution, including the condition of his mental faculties at that time.

The condition of the testator's mind, as evidenced by his actions, conduct and conversation at the time of making a will, is a part of the *res gestæ* of the transaction, and witnesses thereto are competent to speak thereof, and give opinions in relation thereto, without any other knowledge thereof except that derived from his conduct on such occasions. (*Clapp v. Fullerton*, 34 N. Y. 190; *Holcomb v. Holcomb*, 95 id. 316.)

The law presumes knowledge on his part of its provisions, and that what he does deliberately is done with a full comprehension of the legal effect of his act, and the duty which it imposes upon those who comply with his request. It would be contrary to settled rules of law to ascribe to the testator an intention, while making his will and going through the forms required to make it a valid instrument, to leave in operation the provisions of a statute which he had power to waive, but which, if not waived, might frustrate and defeat the whole object of his action. It cannot be doubted that, if a client in his lifetime should call his attorney as a witness in a legal proceeding, to testify to transactions taking place between himself and his attorney, while occupying the relation of attorney and client, such an act would be held to constitute an express waiver of the seal of secrecy imposed by the statute, and can

Statement of case.

it be any less so when the client has left written and oral evidence of his desire that his attorney should testify to facts, learned through their professional relations, upon a judicial proceeding to take place after his death? We think not. (*McKinney v. G. St., etc., R. R. Co.*, 104 N. Y. 352.) The act of the testator, in requesting his attorneys to become witnesses to his will, leaves no doubt as to his intention thereby to exempt them from the operation of the statute, and leave them free to perform the duties of the office assigned them, unrestrained by any objection which he had power to remove.

We have carefully examined other points made by the appellant upon the argument and in the printed brief submitted to the court, but find no material error committed by the trial court, which entitles the appellant to a reversal of the judgment.

The judgment should, therefore, be affirmed, with costs.

All concur.

Judgment affirmed.

SARAH A. ROGERS as Executrix, etc., Respondent, v. GEORGE W. ROGERS, Impleaded, etc., Appellant.

The fact that one of several testamentary trustees is one of the beneficiaries under the trust does not incapacitate him from acting as trustee. He can act freely as to the other beneficiaries and, as to himself, his co-trustees can exercise the control and judgment improper for him.

In case the other trustees decline to act, the court may either supply their place or take upon itself the execution of the trust so far as it ought not to be executed by said trustee and beneficiary.

The will of R. nominated his wife as executrix and four others as executors. It gave his estate to the executrix and executors in trust, to invest and pay to his wife during life, or until she should marry, so much of the income as might be necessary for the comfortable support of herself and the testator's mother, and the maintenance and education of the testator's children. In case the whole of such income should be insufficient for the purposes specified, the will authorized said trustees "to apply to that purpose so much of the principal sum invested as may be necessary to make up the deficiency." The testator left but little personal estate, and resort to the real estate became necessary to carry out the purposes of

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Statement of case.

the trust. *Held*, that the trustees had power, under and pursuant to orders of the court directing it, to borrow money for such purposes, and to mortgage the real estate to secure the same; that the court had power to make the orders and that, therefore, mortgages so executed were valid.

(Argued October 8, 1888; decided November 27, 1888.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made July 18, 1879, which affirmed a judgment of the Special Term herein. (*Mem.* of decision below, 18 Hun, 409.)

This action was brought by plaintiff, as executrix of the last will and testament of Patrick L. Rogers, deceased, for the purpose of obtaining a construction of his will in the particulars stated in the complaint, the substance of which, as well as the facts pertinent to the questions discussed, are set forth in the opinion.

The will, after providing for the payment of the testator's debts and funeral expenses, contained the following provisions:

"SECOND. All the rest, residue and remainder of my estate, property and effects of every nature or kind, which may remain after the payment of my just debts and funeral expenses, I give, devise and bequeath to my executrix and executors hereinafter named, or such of them as shall assume the execution of this, my will, the survivors and survivor, in trust, nevertheless to invest and keep the same invested, in such a manner as they may see fit until the distribution of my estate, as hereinafter provided, and to collect and receive the rents, income or profit thereof, and dispose of the same as follows:

"*First* To pay to my beloved wife during her natural life, or until she shall marry again, or until the youngest of my living children shall attain the age of twenty-one years, whichever event shall first happen, so much of the income and profit of my estate as may be necessary for the comfortable support of herself and my mother, and the maintenance and education of my said children, and in case the whole of such income shall be insufficient for the support of my wife and mother and the maintenance and education of my children, or

Statement of case.

such of them as may be minors, then, and in that case, I authorize my executors and executrix to apply to that purpose so much of the principal sum invested as may be necessary to make up the deficiency.

“*Second.* Upon the youngest of my living children attaining the age of twenty-one years, I direct my executors and executrix, in case my wife shall then be living and unmarried, to invest so much of my estate as may be necessary to produce an annuity of \$1,000 per year, and to pay the same to my said wife during her lifetime, or until she shall marry again, for the support and maintenance of herself and my mother and such of my children, if any, who may need assistance. And to divide all the rest, residue and remainder of my estate equally among such of my children as shall then be living, but in case any of my children shall have died, leaving lawful issue him or her surviving, then to divide the same between such of my children as shall then be living, and the issue of any so deceased in such manner, that the child or children of one so deceased shall take the same share that his, her or their parent would have taken if living.

“*Third.* Upon the death or marriage of my said wife, whichever event may first happen, in case my youngest living child shall have then attained the age of twenty-one years, I direct my executors and executrix, after making a suitable provision for the support of my mother during her lifetime, to divide all the rest, residue and remainder of my estate which may then remain equally between such of my children as shall then be living, or in case either of my said children shall have died, leaving lawful issue, him or her surviving, then to divide the same between such child or children of mine as shall then be living, or the issue then living of any deceased child, in such manner that the child or children shall take the same share which his, her or their parent would have taken if then living.

“*Fourth.* In case the youngest of my living children shall not have attained the age of twenty-one years at the death or marriage of my said wife, then, and in that case, I direct my

Statement of case.

executors and executrix to apply the said rents and income of my estate, or so much thereof as may be necessary for the purpose, to the support and maintenance of my mother during her lifetime, and the maintenance and education of my minor children until the youngest of my living children shall attain the age of twenty-one years, and upon the youngest of my living children attaining full age, to divide the whole, rest, residue and remainder of my estate, except so much as may be necessary for the support of my mother, between such of my children as shall then be living and the descendants of any who may have died leaving issue, in such manner that the child or children of any deceased children shall take the same share which his, her or their parent would have taken if living.

"LASTLY. I here nominate, constitute and appoint my wife Sarah A. Rogers, executrix, and my friends Peter Murray, Samuel B. Barton and Charles Griffiths, all of the city and county of New York, merchants; Daniel O'Connor of said city, builder, executors of this my last will and testament."

The further material facts are stated in the opinion.

C. K. Corliss for appellant. The executrix cannot be a trustee for herself. (*Magoffen v. Patton*, 3 Edw. Ch. 65, 68; *Coster v. Lorillard*, 14 Wend. 265, 354, 355, 380, 381; *Craig v. Hone*, 2 Edw. 554; *Firemens' L. & T. Co. v. Carroll*, 5 Barb. 615, 616, 643, 652; *Bundy v. Bundy*, 38 N. Y. 417; *Wetmore v. Parker*, 52 id. 450, 459; *Amory v. Lord*, 9 id. 411.) Legacies dependent on a void trust fall with it. (*Harvey v. James*, 16 Wend. 174; *Arnold v. Gilbert*, 3 Sandf. Ch. 531; *Slocum v. Slocum*, 4 Edw. 613; *Jackson v. Jansen* 6 Johns. 73.) When a devise of lands in trust is void, the lands descend to the testator's heirs. (*Post v. Hover*, 33 N. Y. 598, 599; *Benedict v. Webb*, 98 id. 460, 466.) The power given to the trustee, "to invest and keep invested the trust estate," implies a power in trust to sell the real estate. (4 Kent's Com. 319; *Morton v. Morton*, 8 Barb. 18; *Dorland v. Dorland*, 2 id. 63; *Bogert v. Hertell*, 4 Hill, 492; *Devone v. Fanning*, 2 Johns. Ch. 252.) The duty of selling the real

Statement of case.

property for the purpose of investment was required by the will and the law to be performed by the trustee immediately on the death of the testator. (*Stagg v. Jackson*, 1 N. Y. 212; *Meakings v. Cromwell*, 5 id. 136; *Savage v. Burnham*, 17 id. 569; *Dodge v. Pond*, 23 id. 69; *White v. Howard*, 46 id. 144; *Manice v. Manice*, 43 id. 372; *Lent v. Howard*, 89 id. 169; *Wells v. Wells*, 88 id. 331; *Kane v. Gott*, 24 Wend. 659; *Robert v. Cowing*, 89 N. Y. 239.) Land directed to be converted into personalty is, in equity, for all the valid purposes of the will, considered as the species of property into which it is directed to be converted. (*Meakings v. Cromwell*, 5 N. Y. 136; *Johnson v. Bennett*, 39 Barb. 237; *Savage v. Burnham*, 17 N. Y. 569; *White v. Howard*, 46 id. 162; *Shumway v. Harmon*, 6 T. & C. 626; *Shipman v. Rollins*, 98 N. Y. 311, 326.) All mortgagees who claim to hold their mortgages under this will are presumed to know the contents of the will, and are thus presumed to know that the executrix and pseudo trustee had no power under the will to execute such mortgages. (*Allen v. De Witt*, 3 N. Y. 284.) A power to sell and convey does not, in itself, confer a power to mortgage. (*Waldron v. McComb*, 1 Hill, 111; *Bloomer v. Waldron*, 3 id. 361; *Contant v. Peross*, 3 Barb. 128; *Cumming v. Williamson*, 1 Sandf. Ch. 17; *Allen v. De Witt*, 3 N. Y. 284; *A. Fire Ins. Co. v. Bay*, 4 id. 19.) The trust property cannot be charged by the trustee, except so far as he is authorized by the terms of the trust. (*L'Amoreaux v. Van Rensselaer*, 1 Barb. Ch. 34.) The will nowhere empowers either the trustee or the executrix to mortgage the realty, and, therefore, the court could not authorize Mrs. Rogers, as trustee, to execute the mortgages. (*Douglas v. Cruyer*, 80 N. Y. 15.) This clause of the will requires the executors and executrix to do acts, and to perform duties which cannot be done and performed without a trust. Under the second clause in the will the executors are trustees, and the estate vests in them as such by necessary implication. (*Leggett v. Perkins*, 2 N. Y. 297; *Craig v. Craig*, 3 Barb. Ch. 76; *Vail v. Vail*, 4 Paige, 317; *S. C.*, 7 Barb. 226; *Meakings v.*

Statement of case.

Cromwell, 5 N. Y. 140, 141; *Leggett v. Hunter*, 19 id. 454; *Knox v. Jones*, 47 id. 389.) Neither the trustees nor the beneficiaries, nor all united, could convey the property and thus destroy the trust. (3 R. S. 2176, 2183, §§ 14, 63, 65; *Cruger v. Jones*, 18 Barb. 467; *Lent v. Howard*, 89 N. Y. 181; *Douglas v. Cruger*, 80 id. 15.) If there was an equitable conversion the trust was a trust of personal property. (*Wells v. Wells*, 88 N. Y. 331; *Kane v. Gott*, 24 Wend. 659.) A trust of personal property suspends, during its continuance, the absolute ownership. (3 R. S. 2256, §§ 1, 2; *Everitt v. Everitt*, 29 N. Y. 39, 71, 72; *Smith v. Edward*, 88 id. 102; *Knox v. Jones*, 47 id. 390, 397; *Gott v. Cook*, 7 Paige, 521, 536; *Schettler v. Smith*, 41 N. Y. 328; *Shipman v. Rollins*, 98 id. 311; *Wells v. Wells*, 88 id. 332.) The provisions of the statute declaring that neither the trustee nor the beneficiary, in case of a trust of real estate, can alienate their respective interests and destroy the trust, have been held applicable to trusts of personal property. (*Lent v. Howard*, 89 N. Y. 181; *Graff v. Bonnett*, 31 id. 9, 13; *Williams v. Thorn*, 70 id. 270; *Gott v. Cook*, 7 Paige, 521, 536; *Cutting v. Cutting*, 86 N. Y. 546; 3 R. S. 2256, §§ 1, 2,; 2176, §§ 14, 15.) The trust is an entirety and cannot be held void in part and valid as to the balance, but it is void in toto. (*Amory v. Lord*, 9 N. Y. 403; *McSorely v. Wilson*, 4 Sandf. Ch. 515; *Field v. Field*, Id. 528; *Knox v. Jones*, 47 N. Y. 389; *Hawley v. James*, 16 Wend. 61, 167, 168; *Benedict v. Webb*, 98 id. 460, 466; *Shipman v. Rollins*, Id. 311, 330; *Holmes v. Mead*, 52 N. Y. 332, 345; *Irving v. De Kay*, 9 Paige, 523; *Colton v. Fox*, 67 N. Y. 348; *Woodruff v. Cook*, 61 id. 638.) The trust being void, the power to mortgage or sell (if any) necessarily fails with the trust. (*Hetzel v. Barber*, 69 N. Y. 13; *Jackson v. Jansen*, 6 Johns. 73; *Sharpstein v. Tillou*, 3 Cow. 651; *Benedict v. Webb*, 98 N. Y. 460, 467; *Brewer v. Brewer*, 11 Hun, 147, 153; 4 Edw. Ch. 613.) The written consent of the adult defendants to the entry of the order of March 30, 1874, is evidence of a fraudulent collusion between them and

Opinion of the Court, per FINCH, J.

the pretended trustee, the plaintiff, to deprive the infant defendants of their title to the real property inherited by them from their father. (*Wright v. Miller*, 8 N. Y. 9; *S. C.*, 1 Sandf. Ch. 103; *Litchfield v. Burwell*, 5 How. 341.) Even if the written consent was necessary from the adult defendants, then it was necessary from the infant defendants. But the guardian *ad litem* could give no such consent. (*Litchfield v. Burwell*, 5 How. 341.) Even if the written consent of the adult beneficiaries that the order dated March 30, 1874, might be made and entered by the court, be not evidence of fraudulent collusion, it does not render the order valid. (*Boerum v. Schenck*, 41 N. Y. 192, 193; *Douglas v. Cruger*, 80 id. 15.)

Samuel V. Speyer for respondent. If the trust is invalid as to Sarah A. Rogers, it is valid as to the other beneficiaries. (*Post v. Hover*, 33 N. Y. 593; *Manice v. Manice*, 43 id. 303, 384.) Sarah A. Rogers can be trustee for herself, and if she cannot, the court will not allow the trust to fail on that account. It will appoint another trustee. (*Brundy v. Brundy*, 38 N. Y. 410.)

FINCH, J. The principal questions argued before us are not in the case, and should not be considered.

The action was brought soon after the death of testator by his wife, as executrix, who had alone qualified. The complaint sought a construction of the will in two respects, about which alone it alleged that doubts had arisen. The first was whether the executrix was authorized to convert the estate, or any part thereof, into money before distribution; and the second was whether, during the minority of Beatrice, who was the youngest child living at testator's death, the executrix could sell any part of the property, and, in case of necessity, apply principal as well as income to her support and that of the minors. There was no suggestion of the invalidity of the trust for any reason, or that the testator died intestate as to the rest and residue of his estate, but assuming the validity of the trust, the questions raised were as to the authority of

Opinion of the Court, per FINCH, J.

the executrix under it. The relief asked was a construction of the will in the respects suggested and in any others which might be raised by the answers or properly brought before the court. The deceased left eleven children, six of whom were minors at his death, for whom a guardian *ad litem* was appointed, the adults appearing by counsel of their own. None of the answers raised any new questions, or suggested any difficulties to be solved beyond those stated in the complaint. Upon these pleadings the case went to trial. What then occurred we do not know, for this appeal stands alone upon the judgment record, no case having been made, and we are bound to assume that the only questions tried and decided were those raised by the pleadings. In October, 1869, or almost twenty years ago, judgment was rendered. In that judgment there is no trace of any determination founded upon a claim or allegation at any time made, that the trust was void. Outside of the formal facts the principal further finding was that, of the five persons named as executors and executrix of the will, Mrs. Rogers alone qualified. As she was beneficiary, to some extent, in the trust, the question raised was whether she could act also as trustee, and could sell and convey the property and appropriate not only income but principal. The court adjudged that she could, but since she was one of the beneficiaries took upon itself the execution of the trust, so far as her discretion was concerned, and sent it to a referee to ascertain and report what had been done with the personal estate and income received; what sum was needed for the widow and the support and education of the minors; and what was the net value of the estate and its income, and what part or parts could be sold or mortgaged. The judgment also authorized any of the parties upon the foot of the decree to apply for further instructions. All this assumed, as did the pleadings, the validity of the trusts, and determined only the authority of the executrix in the emergency which had occurred. The referee reported, and upon the filing of his report, and after hearing all parties, the court ordered that the executrix borrow, upon mortgage, \$15,000 of the Mutual

Opinion of the Court, per FINCH, J.

Life Insurance Company of New York, and directed how much of it annually should be applied to the use of the widow, and how much to the support of the minors and their education. The present appellant, George W. Rogers, now of full age, was then one of the minors, and reaped his share of the benefit of the loan. This order was made in February, 1870.

In August 1871, under another order of the court, the executrix borrowed, on bond and mortgage, of Fernando Yznaga \$21,000, with which the previous loan was paid off and the surplus applied to the use of widow and minors as directed. In May 1872, she borrowed, under a similar order, \$15,000 of Elizabeth Rapelye. In October 1873, she presented a further petition, showing that the real estate by reason of railroad improvements had increased in value \$50,000, or more than the amount of the incumbrances; that taxes, interest, legal expenses, etc., added to medical bills for sickness in the family and the support and education of the minors, made it necessary to borrow an additional \$10,000. A reference was ordered to ascertain the facts. Upon the coming in of the report and upon a stipulation signed by all the adult children, at that time eight in number, leaving but three minors, of whom George W. Rogers was one, and had reached the age of nineteen years, an order was made permitting such new loan. The record does not show whether it was obtained, though it probably was. Two years later, or in 1875, George W. Rogers became of full age. For four years thereafter, or until March 1879, he appears to have remained silent, but at that date an order was entered substituting, as his attorney in the case, Cyrus K. Corliss, in the room of the guardian *ad litem*, and thereupon, ten years after the decision was rendered, an undated paper was filed, signed by the new attorney, containing exceptions to the findings of the trial judge. This paper is the first trace of anything like an objection or exception along the line of the proceedings; and upon its basis it is now sought to overthrow and invalidate the trust, to break down with it the power of sale, and sweep away utterly about \$50,000 of loans upon which this family have lived and this appellant has been

Opinion of the Court, per FINCH, J.

supported and educated. His adversary raises no question as to the regularity of the exceptions filed, but looks with sufficient cheerfulness upon the effort, to sign a stipulation waiving any undertaking on appeal to this court or any deposit of money in lieu thereof.

Under these circumstances, I think it our duty to refuse to consider any question beyond the single one raised and decided by the Special Term, and hold the appellant to a rigid and strict observance of the rules of law. All his exceptions, save one, should be disregarded, because too general, and taken to the whole of the conclusions of law specified by their number, some portions of which, at least, were beyond question correct, and what portions it was intended specifically to assail it is impossible to say; and none of them can raise a question not involved in the case, but they must all stand upon the assumption that the trust was valid in its creation, leaving open only the inquiry whether it could be administered by Mrs. Rogers under the emergency which had arisen.

Two questions, and only two, are, therefore, presented by this appeal: First, whether Mrs. Rogers, being beneficiary, could also act as trustee; and second, whether the orders directing the mortgages were legal and valid.

The will did not attempt to unite in the same person the office of trustee and the interest of beneficiary. Its terms associate with the executrix four other persons as executors and to the five, or such of them as should qualify, the residue was given in trust. The widow could act freely as to the beneficiaries other than herself, and as to herself four remained who could exercise the control and judgment improper for her. Trusts thus constituted are quite common, and although the trustees other than the beneficiary may die or decline to act, the court has power to supply their place, or, if need be, take upon itself the execution of the trust, so far as it ought not to be executed by the trustee who is also beneficiary. In this case the emergency happened. The four executors refused to qualify, and Mrs. Rogers became sole executrix, and that raised the question upon which the Special Term passed, not

Opinion of the Court, per FINCH, J.

of the validity of the trust in its creation, but how it could or should be executed in view of the emergency which had arisen. The court substituted its own discretion for that of the trustee. Through its own officers it inquired into the facts, and dictated in detail all that should be done. It might have appointed a new trustee, but having itself exercised all the discretion reposed anywhere, it might direct the mere formal act of giving the mortgage and distributing the money in the proportions dictated to Mrs. Rogers, for the amount going to her was fixed, and that set apart for the minors she could properly apply. We discover no error in the ruling in this respect.

The appellant further objects that there was no power under the will to mortgage the property, but, if anything, only a power to sell. It is to be observed that neither power was expressly given, but the whole legal estate was vested in the trustee, who might sell or mortgage it, though not in contravention of the trust. The mortgages directed were not in contravention of the trust, but in accordance with it, and to accomplish its performance. The will directed the income of the estate to be paid to the wife, so far as was necessary, for the support of herself and testator's mother, and the maintenance and education of the minors, and, if the whole income was insufficient, to apply so much of the principal as should be needed to make up the deficiency. The personal estate was small and swiftly exhausted. Resort to the real estate required either a sale or a mortgage, and the latter was wisely chosen, since the land was steadily increasing in value, and, by the choice, the benefit of that increase was preserved to those ultimately entitled in remainder.

In all this we find no error, but a prompt appeal by the widow, in the emergency which arose, to the aid and direction of the court, and a series of orders which were lawfully made and both prudent and just.

The judgment and orders should be affirmed, with costs.

All concur.

Ordered accordingly.

Statement of case.

CYRUS W. LODER, Respondent, v. WILLIAM M. WHELPLEY et al., Appellants.

111	239
113	78
111	239
140	235
111	239
146	137

Where the probate of a will is contested, legatees under it are not competent witnesses for the proponent as to personal transactions or communications between them and the testator. (Code of Civil Pro. § 829.)

Where a legatee, however, has executed a valid release of all his interest the disability is removed, and he may properly be examined as a witness. An executor and proponent of a will is not disqualified from testifying to such transactions or communications.

The provision of the Code of Civil Procedure (§ 884), prohibiting a physician or surgeon from disclosing "any information which he acquired in attending a patient in a professional capacity," etc., applies to proceedings for the probate of a will, and after the death of the patient the prohibition cannot be waived by anyone.

The fact, therefore, that a physician is called as a witness by an executor and proponent of a will, does not render him competent to disclose any information acquired while attending upon the testator.

An attorney, in receiving the directions or instructions of one intending to make a will, although he asks no questions and gives no advice, but simply reduces to writing the directions given to him, still acts in a professional capacity and is prohibited from disclosing any communication so made to him by his client. (Code of Civil Pro. § 835.)

Where, however, testimony so prohibited has been improperly received by the surrogate, it is not a sufficient ground for a reversal of his decree "unless it appears to the appellate court that the exceptant was necessarily prejudiced thereby," (Code of Civil Pro. § 2545); *i. e.*, to authorize a reversal it must appear that without the improper evidence the respondent would not have succeeded.

At the close of the evidence before the surrogate in proceedings for the probate of a will, the contestants moved to strike out certain testimony claimed to be incompetent, the surrogate stated that the motion was substantially disposed of by the opinion in the case. *Held*, that, as the opinion was thus incorporated into the decision, and as, in the opinion, the surrogate stated his conclusion to be to disregard such evidence, this was substantially granting the motion.

(Argued October 1, 1888; decided November 27, 1888.)

APPEALS from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an ordered made February 10, 1886, which affirmed a decree of the surrogate of Westchester county for the probate of a paper purporting to be the will of Eva J. Banks, deceased.

Statement of case.

The proceedings were instituted upon the petition of Cyrus W. Loder, one of the executors named in the will; this was dated May 15, 1877.

Objections were made by Benjamin G. Hitchings, claiming as legatee and executor under a will, dated in 1874, and by William H. Whelpley and Louisa M. Craft, as next of kin of the testatrix, in substance: (1.) That the testatrix had no mental capacity to make the will in question; (2) that she was induced to make it by fraud and undue influence; (3) that it was not executed in due form. The surrogate found in favor of the proponent upon all points, and admitted the will to probate. All the contestants appealed to the Supreme Court and to this court.

The facts material to the questions discussed are stated in the opinion.

Benjamin G. Hitchings for appellants. The testimony of the doctors, Mixell, Sands and Griswold, was inadmissible under sections 834 and 836 of the Code, and the objections cannot be waived. (*Edington v. Mut. Life Ins. Co.*, 67 N. Y. 185; *Same v. Aetna Life Ins. Co.*, 77 id. 564; *Grattan, Ex. v. Met. Life Ins. Co.*, 80 id. 231; *Bacon v. Frisbie*, Id. 394; *Root v. Wright*, 84 id. 72; *Dilleber v. Home Life Ins. Co.*, 87 id. 79; *Westover v. Aetna Ins. Co.*, 99 id. 56; *In re Smith*, 95 id. 51; *Renihan v. Denier*, 103 id. 573; *Holcomb v. Holcomb*, 95 id. 316.) Section 829 of the Code applies to proceedings in Surrogates' Courts. (*Tilton v. Ormsby*, 10 Hun, 71; 70 N. Y. 609; 48 Barb. 417; 23 Hun, 139; *In re Smith*, 95 N. Y. 516.) The proponent of the will of 1874, as well as the next of kin, had a right to object to the testimony. (*In re Smith*, 95 N. Y. 516.) Henry D. Loder being an executor and legatee under the will, and, therefore, interested in the event, his testimony was clearly inadmissible. (*In re Wilson*, 103 N. Y. 374; *Children's Aid Society v. Loveridge*, 70 id. 387; 2 R. S. 65, § 50; Redf. 109, 110, 208.) The release was void for want of a proper party as releasee, as in every deed there must be a person *in esse*, capable of taking

Statement of case.

to whom the release must run. (Jacob's Law Dict., Tit. Deed and Release; Bouvier's Law Dict., Deed and Release; 3 Cruise's Dig. 14; Sheppard's Touchstone, 229, 236, 323.) A mere possibility cannot be released, (2 R. S. pt. 2, tit. 2, art. 1, § 16; *Humbert v. Winston*, 22 Hun, 425; *In re Flandreau*, 28 id. 282.) The evidence of Henry D. Loder, as to communications of the testatrix to him in the course of his employment as her attorney and counsel, was inadmissible. (Code, §§ 835, 836; *Root v. Wright*, 84 N. Y. 72; 1 Bliss Code, 714; *Genet v. Ketchum*, 62 N. Y. 626; 95 id. 516; *Hoyt v. Jackson*, 3 Dem. 338, 324; 14 Johns. 391; 4 Wend. 558; *Renihan v. Denier*, 103 N. Y. 573; *Holcomb v. Holcomb*, 95 id. 316; *Westover v. Aetna Ins. Co.*, 99 id. 56.) The testimony of Cyrus W. Loder, the proponent of the will of 1877, as to conversations between him and the deceased testatrix, offered and admitted in support of the will propounded by him, were inadmissible under section 829. (*In re Burke*, 4 Sandf. Ch. 617; *Wilkes v. Rogers*, 6 Johns. Ch. 526; *Poucher v. Scott*, 33 Hun, 233; 98 N. Y. 424.)

John Frankenheimer for appellants. It was error to admit the testimony of the attending physicians. (*Renihan v. Denin*, 103 N. Y. 573; *Westover v. Aetna Ins. Co.*, 99 id. 56; *Heuston v. Timpson*, 17 N. E. Rep. [Ind.] 261; *In re Smith*, 95 N. Y. 516; *Holcomb v. Holcomb*, Id. 316.) The prohibition against communications from a client to an attorney is not confined to communications made in contemplation, or in the progress of an action, but applies to those made in reference to any matter which is the proper subject of professional employment. (*Root v. Wright*, 84 N. Y. 72; *Bacon v. Frisbie*, 80 id. 394; *Pearsall v. Elmer*, 5 Redf. 181.) The prohibition extends to papers, and applies to the memorandum of will and letters received by Henry D. Loder from deceased. (*Genet v. Ketchum*, 62 N. Y. 626; *Pearsall v. Elmer*, 5 Redf. 181.) The testimony of Cyrus W. Loder, the proponent of the will of 1887, as to conversations and transactions with the deceased, offered and admitted in support of the will

Statement of case.

propounded by him, was inadmissible under section 839, as he was testifying in his own behalf. (*Mattoon v. Young*, 45 N. Y. 696; *Van Tuyl v. Van Tuyl*, 57 Barb. 235; *Timon v. Claffy*, 45 id. 438; *Conroy v. Claffy*, 41 N. Y. 619; *Poucher v. Scott*, 33 Hun, 223; 98 N. Y. 422; *Wilkin v. English*, 24 Hun, 32; *Steele v. Ward*, 30 id. 555; *Holcomb v. Holcomb*, 95 N. Y. 316, 325; *Garvey v. Owens*, 37 Hun, 498, 503; *Corning v. Walker*, 100 N. Y. 549; 28 Hun, 435; *Church v. Howard*, 79 N. Y. 415; *Hill v. Alford*, 19 Hun, 77; *In re Wilson*, 103 N. Y. 374.) Henry D. Loder, as a legatee named in the will, is clearly a person interested in the event, and, as such, his testimony is incompetent. (*Snyder v. Sherman*, 23 Hun, 139.) The subsequent release or assignment did not make him a competent witness, because it was executed merely for the purpose of enabling him to testify. (*Mattoon v. Young*, 45 N. Y. 696, 701; *Maganow v. Bell*, 13 N. W. Rep. 277; *Sherwood v. Judd*, 3 Bradf. 267.) The release or assignment did not divest Henry Loder of this beneficial interest, because, until probate, there is no one to whom the legacy can be released. (*Jackson v. Fountain*, 2 Johns. 170; Bouvier Law Dict., tit. Release; *Topham v. Tallier*, 2 Ld. Raymond, 786; 2 Salk. 575; *Mattoon v. Young*, 45 N. Y. 696; *Lyons v. Snyder*, 61 Barb. 172; *Smith v. Cross*, 90 N. Y. 546.) The contestants in probate proceedings are entitled to the benefits of section 829 of the Code. (*In re Smith*, 95 N. Y. 516; *Cadmus v. Oakley*, 3 Dem. 324.) If testimony comes within the reason of the law, this is sufficient to exclude it. (*Mattoon v. Young*, 45 N. Y. 696; *Van Tuyl v. Van Tuyl*, 57 Barb. 235; *Timon v. Claffy*, 45 id. 438; *Conroy v. Claffy*, 41 N. Y. 619.) If the testimony of Cyrus W. Loder and Henry D. Loder is inadmissible, under section 829, as to personal transactions or communications with the deceased, then it was error to admit it. (*Holcomb v. Holcomb*, 95 N. Y. 316; *In re Smith*, Id. 516; *Lane v. Lane*, Id. 494; *Kraushaar v. Meyer*, 72 id. 602; *Lee v. Dill*, 39 Barb. 516; *Braque v. Lord*, 67 N. Y. 495; *Garvey v. Owens*, 37 Hun. 498; *Ressigue v. Mason*, 58 Barb. 89; *Denman v. Jayne*, 3 Hun, 614; *Snyder*

Statement of case.

v. *Sherman*, 23 id. 139; *Schoonmaker v. Woolford*, 20 id. 166; *Schufelt v. Watrous*, 16 Week. Dig. 195; *Van Gelder v. Van Gelder*, 81 N. Y. 625; *Waver v. Waver*, 15 Hun, 277; *Mulqueen v. Duffy*, 6 id. 299; *Haughey v. Wright*, 12 id. 179.) Beneficiaries under a will cannot testify as to personal transactions or communications with the deceased. (*Snyder v. Sherman*, 23 Hun, 239; *Lee v. Dill*, 39 Barb. 516; 41 N. Y. 619; *Braque v. Lord*, 67 id. 495.) The uncorroborated testimony of interested parties is not such clear, affirmative, coercive evidence as will rebut the presumption against the validity of the will in question. (*Fulton v. Andrews*, L. R., 7 H. of L. 448 [1875]; *Hegarty v. King*, 5 L. R. [Irish], 249; 7 id. 18 [1880]; *Wilson v. Moran*, 3 Bradf. 172; *Crispel v. Dubois*, 4 Barb. 393, 398; *Laycraft v. Simmons*, 3 Bradf. 35; *Booth v. Kitchen*, 3 Redf. 52; *Children's Aid Soc. v. Loveridge*, 70 N. Y. 387; *Marx v. McGlynn*, 88 id. 357; *Kinne v. Johnston*, 60 Barb. 69; *Dickie v. Van Vleck*, 5 Redf. 284; *Barry v. Butlin*, 2 Moore P. C. C. 480; *Paske v. Ollat*, 2 Phill. 323.)

Frank B. Colton for respondent. An executor propounding a will for probate is not a "party" to the proceedings within the meaning of section 829 of the Code, nor does his right to commissions render him incompetent by reason of interest. (*In re Wilson*, 103 N. Y. 374; *Children's Aid Soc. v. Loveridge*, 70 id. 387; *Rugg v. Rugg*, 83 id. 592.) The burden of showing the testimony of the attending physicians, and of the attorney who drew the will, to be incompetent under sections 834 and 835 of the Code, was upon the appellants. (*People v. Schuyler*, 106 N. Y. 298; *Eddington v. Aetna Life Ins. Co.*, 77 id. 571.) Even were the will harsh, capricious and unjust, that fact would raise no presumption against its validity or the capacity of testatrix. (*Gardner v. Gardner*, 34 N. Y. 162; *Brick v. Brick*, 66 id. 155; *Cudney v. Cudney*, 68 id. 150.) No presumption of fraud or undue influence arises from the relations which existed between Henry D. Loder and testatrix previous

Opinion of the Court, per DANFORTH, J.

to her death, nor from the fact that he drafted and superintended the execution of the will. (*Barry v. Butlin*, 1 Curtis Ec. Rep. 637; *Coffin v. Coffin*, 23 N. Y. 9; *Tyler v. Gardner*, 35 id. 559; *Cudney v. Cudney*, 68 id. 148; *Post v. Mason*, 91 id. 539; *In re Smith*, 95 id., 523; *In re Darrow*, id. 668; *In re Martin* 98 id. 193; Jarman on Wills [5th Am. ed.] 67.)

DANFORTH, J. The testatrix, as the appellants concede, was a person "of education and capacity, and up to 1871 carefully managed all her own affairs," and one of the contestants put forward for probate, and, therefore, as an act of a competent testatrix, a will executed by her in 1874. The surrogate found her to be of sufficient capacity, and not under restraint or undue influence at the time of the execution of the will of 1877, and admitted it to probate. His findings are not without evidence in their support, and if certain testimony, objected to by the contestants, was properly received, or may be disregarded without affecting the result, those findings are conclusive and a sufficient answer to such requests of the contestants as were material.

Objection is made that the testimony of (1) Henrietta Babbitt, Eliza J. Babbitt and Isaac M. Babbitt, legatees under the will, (2), the testimony of Henry L. Loder, legatee and executor, and (3), that of Cyrus W. Loder, proponent of the will, was all inadmissible under section 829 of the Code, and that the testimony of Mixsell, Sands and Griswold was inadmissible under sections 834 and 836 of the Code, because they were physicians, and that of Henry D. Loder, because he was also the testatrix's attorney and counsel, and so disqualified under the same sections.

First. The testimony of the legatees, so far as it related to communications with the testatrix or transactions with her, was inadmissible because excluded by the Code (§ 829), and so the surrogate held. At the close of the evidence the contestants moved to strike out such portions of the testimony of these and other witnesses as were claimed to be incompetent under

Opinion of the Court, per DANFORTH, J.

the various provisions of the Code (§§ 829, 834, 835), (and which had been objected to) and the surrogate said the motion was substantially disposed of by the opinion in the case; thus incorporating the opinion into the decision, and turning to it, we find that after declaring that the question lay at the threshold of the case and had been elaborately presented by counsel, he says he has "endeavored to deduce such rule" for his guidance "as the authorities cited seem to warrant," and states his conclusion "to disregard so much of the testimony of the legatees as is covered by the objection to a narration by them of communications or transactions with the deceased." Moreover, the evidence of these parties was addressed to points fully established by other evidence, and it is clear not only that it did not harm the contestants, but that when stricken out its absence could not in any proper view have affected the result.

Second. The testimony of Henry D. Loder. He is executor and legatee under the will, and, as such, his testimony was subject to the objection warranted by the same section (§ 829). But he released all his interest as legatee by an instrument in due form and valid, and by that release became subject to examination as a witness. (*In the Matter of Wilson*, 103 N. Y. 374.)

Third. The testimony of Cyrus W. Loder was of the kind referred to in section 829. He was, as executor, the proponent of the will. The appellants' claim is that he is, therefore, a party to the proceedings, and so disqualified. This relation was under consideration in *Children's Aid Society v. Loveridge* (70 N. Y. 387), and it was held to constitute no obstacle to a proponent giving evidence of personal transactions with the deceased person. This decision was followed in other cases and cited with approval in *Matter of Wilson* (*supra*). Those decisions make discussion upon the point unnecessary.

Fourth. The testimony of Drs. Griswold, Mixsell and Sands. The first was physician to the testatrix from 1867 to the fall of 1875; the second was first called to her September 9, 1876; the third in 1880. Each physician was asked by

Opinion of the Court, per DANFORTH, J.

proponent's counsel, questions as to her health while under his observation, and in each case the contestants objected, on the ground that under the statute (§ 834 of the Code), information obtained by a physician was privileged, and not to be disclosed. The surrogate said he would take the testimony of both sides upon the subject and announce his decision subsequently.

Afterwards the contestants called Dr. Schmidt, who was her physician from October, 1880, until her death in January, 1882, and he testified concerning her mental and bodily condition. At the close a motion was made by counsel for the contestants to strike out such portions of the testimony of the physicians called by the proponent as were, in their opinion, excluded by the statute, but the motion was denied, as we learn from the opinion already referred to, upon the ground that the prohibitions of the Code did not apply to proceedings for the probate of a will, but if they did, that only the representative of the patient could object; that the executor named in the will was such representative, and that the objection was not only not made by him, but that he, by calling the witnesses, expressly waived the privilege of the statute. That this view is untenable, and the exception well taken, is settled by *Westover v. Ins. Co.* (99 N. Y. 56), and *Renihan v. Dennin* (103 id. 573). These cases, it is proper to say, were decided after the decision of the surrogate, and the views expressed by him were sustained by no inconsiderable amount of reason and logic, and by several cases in other courts. But in the *Westover Case* (*supra*), we held that after the patient's death no one could waive the privilege, and in the other (*supra*), that the statute did apply to probate proceedings. It follows that the exception is before us for review (Code of Procedure, § 2545), but by the same section it is expressly declared that the decree of a surrogate shall not be reversed "for an error in admitting or rejecting evidence, unless it appears to the appellate court that the exceptant was necessarily prejudiced thereby." Under the practice, as it prevailed before this legislative prohibition, if the necessary

Opinion of the Court, per DANFORTH, J.

facts were established by unobjectionable evidence, it was held to be immaterial that incompetent witnesses also testified to the same matter (*Schenck v. Dart*, 22 N. Y. 420), and the erroneous admission of evidence was no ground for reversal, if the facts were established by legal evidence. (*Gardiner v. Gardiner*, 34 N. Y. 164; *Clapp v. Fullerton*, id. 190.) In obedience to the section cited (*supra*), we have since held, that an appeal must fail unless it is apparent that without the improper evidence the respondent had not succeeded. (*In re Will of Ross*, 87 N. Y. 514; *Snyder v. Sherman*, 88 id. 656.) When that does appear the appellant brings the case within the statute (*In re Smith*, 95 N. Y. 516), but if the judgment is clearly right, notwithstanding the error, it is no ground for reversal.

So far as the physicians are concerned, the most that can be said is, that they fail to show any derangement, actual or suspected, in the mind of the testatrix. They were called at various times to treat her for bodily ailments, and the information obtained for that purpose, or during those interviews, might be wholly stricken out without impairing or, in any degree, diminishing the weight of evidence which was before the surrogate. Griswold visited the testatrix "periodically" from 1867 to 1875; at no time treated her for other than gastric trouble, and if any possible importance could be attached to his evidence, it would be because of the extended cross-examination of the contestant's counsel, who availed himself of the opportunity to inquire minutely into all the facts known to the physician, whether developed on the direct examination or not. But the point of inquiry upon the issue was as to the condition of the testatrix in May, 1877, the time of the execution of the will. It does not appear that at that time or for nearly two years previous this witness had seen the testatrix, or ministered to her. If the effect of his testimony was to show that she was sane up to 1875, it was nothing more than the law presumed, for the law presumes every man and every woman to have the use of reason and understanding until the contrary is proved. Mixsell was first called to her in Septem-

Opinion of the Court, per DANFORTH, J.

ber, 1876, and the last time in 1877. He treated her for malaria, nothing else; his professional visits were not numerous; his non-professional and friendly interviews were very numerous — he visited at the house where she was staying; was there at meal times at the table with her very often; about one hundred times; narrates visits which were not of a professional kind; characterizes her memory and her mental condition as displayed on those occasions. Sands began his visits in 1880, and saw her but two or three times; also for malaria; “saw right through her case, treated her for it, and the next day she was well.” He did not look for any other disease and nothing called his attention to the condition of her mind.

If his testimony was inadmissible, it was unimportant and clearly not prejudicial to the exceptants. Neither was that of the other physicians, and it would be in disparagement rather than in aid of justice to give any weight to the exception.

Fifth. The evidence of Henry D. Loder, as to communications made to him by the testatrix, in the course of his professional employment: The Code (§ 835), provides that “an attorney or counselor-at-law shall not be allowed to disclose a communication made by his client to him, or his advice given thereon in the course of his professional employment.” The surrogate received the evidence upon the grounds stated above, in regard to the testimony of the physicians. It follows that if the evidence received is of the character described in the statute, there was error in his ruling. The witness, upon the employment of the testatrix, drew and superintended the execution of the will. He drew the will from a memorandum prepared by her and addressed to him. While he was under examination it was offered in evidence, but objected to and received by the surrogate. A lawyer, in receiving the directions or instructions of one intending to make a will, is confided in by reason of his professional character as a counselor, and he acts in that capacity, although asking no questions and without advising, he does nothing more than to reduce those directions to writing. The relation, therefore, between the testatrix and the witness was that of client and

Opinion of the Court, per DANFORTH, J.

attorney. Under what circumstances, then, and to what end did he testify?

The proof of the execution of the will was complete and perfect, it was followed by a cross-examination, at great length, by two counsel, representing different contestants, serving only to confirm and strengthen, by a variety of repetitions, the facts related by the subscribing witnesses. The testatrix was shown to be of perfect mind and memory, to have executed the instrument in the presence of her friends and neighbors, they signing, as witnesses, at her request, she at the same time declaring the paper to be her last will and testament, and after they had signed "she said," as they testify, she was "sorry to trouble us, but it was something we all had to do for each other, and thanked us for doing it for her." The will was then received in evidence, and it is not objected by either contestant that in this there was any error.

The contestants then went into evidence, and this evidence we have examined, not for the purpose of passing upon the question of fact disposed of by the surrogate, but to see whether it presented a case which made the exceptions under review material in any aspect. It fails to do so. Upon the question of mental competency, on the part of the testatrix, it would, even if wholly uncontradicted or unopposed by other evidence, raise no doubt, nor excite suspicion even, that at the time of the execution of the will she was not sane in mind, capable of discrimination and exercising it, and altogether self-possessed. She was advanced in years, and subsequently indicated a wavering and uncertain mind and peculiarity of conduct, but at the time made material by the issue she was free from any derangement, or in any way beside herself. Other evidence from the proponent on this point was unnecessary. But the lawyer who drew the will was a beneficiary under it to the amount of \$1,000, and when the proponent took the case he produced the memorandum to which I have referred. In regard to it he testified as to, and in that connection stated, interviews with the testatrix, which

Opinion of the Court, per DANFORTH, J.

we hold to be inadmissible. The evidence was intended to repel the suggestion that the will was the result of undue influence, or in any way improperly obtained by the attorney. It was no doubt useful for that purpose, and it was put in rather by way of self-vindication and from over caution, but it was unnecessary. A person of sound mind, acting with full knowledge of her affairs, competent to understand her relations to those whom she wished to benefit, may bestow her bounty as she likes and no presumption of unfair dealing can arise, although one of the beneficiaries happens to be her attorney. Undue influence, when relied upon to defeat a testamentary disposition, must be proved, and not merely assumed to exist. (*In re Smith*, 95 N. Y. 516.) It was the duty of the contestants to prove, if they could, that the will was other than the free act of the testatrix, and until some impediment was shown, there was no need of further testimony from the proponent upon the point. It may be fairly said that none was given by the contestants. The evidence discloses a complete knowledge on the part of the testatrix of the contents of the will, a full legal capacity and the absence of restraint.

The surrogate found her competent, and upon the point now under consideration, being asked by the contestants to find, "that aside from the evidence of Loder as to conversations and communications between himself and the testatrix prior to the execution of the will, and that of Cyrus Loder as to communications subsequent thereto, there was no evidence that she had read and understood the provisions of the will, or to repel the presumption arising from the will having been drawn and its execution superintended by Loder, who is a beneficiary under it," refused so to find, and did find that the objections of the contestants to the testatrix's capacity to make a will, were unproven and unsustained. The General Term agree in this conclusion. The learned judge, reviewing the evidence, finds mental capacity and no proof of undue influence. This result is justified by testimony which leaves no doubt of its correctness, and, leaving out all the evidence objected to by the con-

Statement of case.

testants, the same result, and that only could be reached. The contest, indeed, seems to have been without foundation, and it was disposed of by the surrogate through no error to the prejudice of the contestants, but in the only manner of which the evidence properly received would admit.

The appeal, therefore, fails, and the judgment and order appealed from should be affirmed, but, under the circumstances of the case, we think it should be without costs to either party in this court.

All concur.

Judgment affirmed.

GEORGE GORHAM, as Executor, etc., Respondent v. MILLARD
P. FILLMORE, Appellant.

In an ante-nuptial agreement, both the parties to which were persons of large means, after clear and definite provisions had been made as to the interest each should take in the property of the other during life and after the death of the other, was contained the following clause: "All the furniture, plate, horses, carriages and other personal property *in use by the parties for family purposes*, at the time of the death of either, shall vest absolutely in the survivor." The parties intermarried, and F., the husband, died first. In an action by the executor of the wife to recover certain personal property, the title to which he claimed became vested in the wife, *held*, that the clause included such property as they both had been accustomed to use in their domestic life, and whose continued enjoyment was essential to the personal comfort and convenience of those habituated to its daily use; that it did not include property not so in use, or such as was employed for the use and enjoyment of the respective parties individually; nor did it include heir-looms, valuable mainly because of their relation to and association with the family of one of the parties, by whose members it had been acquired.

Among the property claimed by plaintiff was a large and very valuable library owned by F. at his decease, the collection of which had occupied his lifetime. He had held the office of President of the United States, and, during his incumbency of that office, large additions to the library were made, more or less associated with the office. *Held*, that the library did not pass to the wife under the clause in question.

F. owned a quantity of silverware, which had been kept in a box in a safe, and which was marked with his initials and those of other members of his

Statement of case.

family, and other silverware purchased by his first wife with the proceeds of a present made to her while she occupied the presidential mansion, none of which had been in ordinary use, but were kept in store by themselves. On one or two occasions of public receptions a few of the pieces of plate had been used to decorate the tables and rooms. *Held*, that this silverware was not included in the contract.

So, also, *held*, as to a quantity of wines acquired by F. while he was president, none of which, so far as appeared, had ever been used for family purposes.

So, also, *held*, as to trunks bought and used by F. individually, and other personal property which had, for a long time, been excluded from the house and had not been in use.

(Argued October 8, 1888; decided November 27, 1888.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 22, 1886, which affirmed a judgment in favor of plaintiff, entered upon the report of a referee.

This action was brought by plaintiff, as executor of Caroline C. Fillmore, deceased, to recover possession of a quantity of personal property owned by Millard Fillmore, the former husband of the testatrix, at the time of his decease.

The property in question consisted principally of the library of the said Fillmore, maps and rack, a quantity of silverware, kept in a white tin box in a safe, a quantity of wine, and a number of trunks

The facts, so far as material, are stated in the opinion.

H. C. Day for appellant. Ante-nuptial contracts, intended to regulate the interest which each of the parties to the marriage shall take in the property of the other during coverture or after death, are favored by the courts. (*Johnston v. Spicer* 107 N. Y. 185; *Throop Grain Cleaning Co. v. Smith*, 16 N. Y. S. R. 821, 833.) The plaintiff, in order to establish his title to the property in question, under the provisions of the sixth clause of the ante nuptial contract, was bound to show that the same was "in use by the parties for family purposes at the time of the death of Mr. Fillmore. (*Sheldon v. Sheldon*, 51 N. Y. 354; *Wedgman v. Childs*, 41 id. 159; *Matthews v. Coe*, 49 id. 57; *S. C.*, 70 id. 239, 246; *Sickels v. Flanagan*, 79 id. 224.)

Opinion of the Court, per RUGER, Ch. J.

Spencer Clinton for respondent. The silver marked with the initials of Mr. Fillmore's first wife and of his daughter was his property at the time of his marriage with the testatrix without administration. (*Vallance v. Bausch*, 28 Barb. 633; *Burke v. Valentine*, 52 id. 412; *Watson v. Bonny*, 2 Sandf. 405.) As to all the other property, a fair construction of the marriage settlement requires that it should be held to have become Mrs. Fillmore's upon Mr. Fillmore's death. (*Pierce v. Pierce*, 71 N. Y. 154.) Marriage articles are considered as the heads or minutes, only, of an agreement entered into between the parties upon valuable consideration (the marriage), and being in their nature executory, ought to be construed and molded in equity according to the intention of the parties at the time of making them. (*Tabb v. Archer*, 3 H. & M. [Va.] 399; *McGuire v. Scully*, 1 McM. [S. C.] 378; *Horry v. Horry*, 2 Desaussure [S. C.] 125; *Wilcox v. Hubbard*, 4 Mum. [Va.] 346; *Dayton v. Tillon*, 1 Robt. 21.)

RUGER, Ch. J. The controversy in this case involves the construction of the sixth clause of a contract made between Millard Fillmore and Mrs. Caroline C. McIntosh, on December 21, 1857, in anticipation of their marriage, which took place shortly thereafter. The clause is as follows:

"*Sixthly*. All the furniture, plate, horses, carriages and other personal property *in use by the parties for family purposes*, at the time of the death of either, shall vest absolutely in the survivor, without inventory or liability to account therefor in any way."

The evidence in the case is wholly undisputed, and the question to be determined is one purely of law, arising upon the construction of the agreement. It appears, by the evidence, that at the time of its execution Mr. Fillmore was a resident of Buffalo; a gentleman of wealth, leisure and culture, having occupied the highest civil station attainable in this country by a citizen, and having retired therefrom a few years before, with the respect and esteem of his fellow-countrymen. Mrs. McIntosh resided at Albany, of which

Opinion of the Court, per RUGER, Ch. J.

city she had long been a resident, and had occupied a high position in its social circles, being a lady of culture and refinement, possessed of ample means and leading a life of elegant leisure and enjoyment. The contract was drawn by distinguished lawyers, the mutual friends of both parties; Judge Nathan K. Hall acting on behalf of Mr. Fillmore, and Senator Ira Harris for Mrs. McIntosh. After the marriage the parties took up their abode in the mansion owned by Mr. Fillmore on Delaware avenue, in the city of Buffalo, and they resided there together until the death of Mr. Fillmore in 1874, after which time Mrs. Fillmore continued to reside there until her death in 1881.

It does not appear that either of the parties had any living descendants or near relatives other than the defendant, who was the son of Mr. Fillmore, and who became and continued a member of the family from the time of the marriage down to the death of Mrs. Fillmore. The defendant was appointed executor and Mrs. Fillmore executrix of the will of Millard Fillmore, and the property in dispute in this action, remained in the family residence until Mrs. Fillmore's death, unappropriated and undisposed of by either party. No controversy arose between Mrs. Fillmore and her son for the several years during which they used this property in common; but, after her death, its exclusive possession was claimed by the plaintiff, as her executor, under the clause of the contract hereinbefore quoted, and this action was brought to recover its possession. The decisions of the courts below have favored the claim of the executor, and this appeal has been taken to review their determination.

It is not probable that such a controversy would have arisen if the tastes and desires of the parties to the contract could have been consulted; but the executor, feeling constrained by a supposed legal obligation resting upon him, has brought this action in an amicable spirit to settle judicially the title to the property. It will doubtless be as gratifying to the feelings of the plaintiff as to other friends of the parties, if it shall be found to be in accordance with the law, that the disposition

Opinion of the Court, per RUGER, Ch. J.

of this property, may be made to accord with what must instinctively be felt by all persons acquainted with the circumstances, to have been the wish and desire of the contracting parties. The question is not wholly free from doubt; but following the rule which obtains in the construction of all contracts, viz., that the intentions of the parties must control, we can reach a conclusion which seems to us to be reasonably satisfactory.

This contract must be regarded as one drawn with great care, with a full understanding of the precise meaning of the language employed, and an intention that each word and sentence shall have its appropriate influence and effect upon the construction of the instrument. It will thus be seen that following the general words containing a description of the property covered by the clause, there occur expressions intended to effect a limitation of their meaning, and confining it to such property as is used in a particular manner. We do not think that the courts below have given that effect to the words of this limitation which they are justly entitled to, considering the obvious intention with which they were employed. They were evidently used to exclude from the operation of the agreement all such property as was employed for the use and enjoyment of the respective parties individually, as well as that not in use for family purposes; and, we think, that class of property also in the nature of heir looms, which is rendered valuable mainly because of its relations to, and associations with the family by whose members it was acquired, and to whom it naturally belongs. It can hardly be supposed that Mr. Fillmore intended that any articles of property which came to him as incidents of the high office he had filled, and which would be desirable to his family as evidences and mementoes of the distinction enjoyed by him, should be taken from them upon his death, and conferred upon strangers to his blood. Neither, we think, can it be supposed that a valuable gallery of paintings, such as that possessed by Mrs. McIntosh at the time of her marriage, and subsequently used to adorn the walls of the family residence,

Opinion of the Court, per RUGER, Ch. J.

could have been intended to pass under the general designation of furniture or other "personal property," as used in this contract. We are also quite unable to suppose that the parties to the contract were, when drafting the clause in question, influenced by mercenary considerations or made nice calculations with a view of balancing the pecuniary benefits to be derived by them respectively therefrom, or weighed with scrupulous exactness the financial possibilities of the contemplated marriage.

It is significant of the intention of the parties that the prior clauses of the contract had determined clearly and definitely the interest which the respective parties should take in the property of the other, not only during their lifetime, but upon the death of either, and the clause in question was the last provision of the contract and was apparently of minor importance, introduced for the purpose of securing the comfort and convenience of the survivor of the marriage.

We think a reasonable and fair construction of the contract leads to the conclusion that this clause was inserted for the purpose of providing for the continued use and enjoyment by the survivor, of the family property, which they had both been accustomed to use in their domestic life, and the continued enjoyment of which was essential to the personal comfort and convenience of those who had been habituated to its daily use. No other construction is consistent with our idea of the high character, distinguished position and refined tastes of the parties to the agreement. Such property was intended to pass as was "in use by the parties for family purposes," and no other.

The question presented is widely different from that which would have arisen had the words of limitation been omitted. We have been referred to no case which seems to us to be in point upon the question involved here, and the case must, therefore, be decided by the construction to be given to the peculiar language of the particular contract, and the inferences which we are able to draw therefrom as to the intention of

Opinion of the Court, per RUGER, Ch. J.

the parties, in view of their situation and condition in life and the circumstances surrounding them.

The main subject of contention between the parties is the library of Mr. Fillmore, the collection of which had occupied his whole lifetime, and to which, we may reasonably suppose, large additions were made during his incumbency of the office of president, and which were more or less associated with that distinction. This property would seem to have been under the consideration of the counsel who draw the contract, as it was much the most valuable possession of Mr. Fillmore's as connected with his residence, and it seems strange that horses, carriages and furniture should be specially mentioned, while this more important item should be left to the uncertain description of general words, if it was intended to be included therein. Neither paintings, books or a library are mentioned, and we cannot believe that the eminent lawyers who drew this contract would have omitted to describe them, or have left it a matter of doubt, if they had supposed such property was to be included in the provisions of this clause. The bulk of the books, which would naturally have been collected by such a man as Mr. Fillmore, would probably have little in them to attract the notice or attention of a lady, and it may well be inferred that their acquisition by her would not be especially coveted, while to the relatives of his own blood their possession would naturally be an object of pride and satisfaction. It is not reasonable, we think, to suppose that Mr. Fillmore contemplated a disposition of this property upon the death of himself and Mrs. Fillmore, which would take it away from his immediate family and descendants, and confer it upon those who were not of kin to him, whose name would not recall his reputation, and who were not interested in its perpetuation. Such a construction is not necessary to satisfy the language of this contract, and, we think, it cannot be given to it without violating the intention of the parties.

We also think that the silverware contained in the white tin box, and that purchased by the first wife of Mr. Fillmore

Opinion of the Court, per RUGER, Ch. J.

with the proceeds of a present made to her by ladies of New York while she occupied the presidential mansion, were not covered by the language of the contract. The evidence is undisputed that these articles were not in use for family purposes, but were kept in store by themselves, marked with the initials of Mr. Fillmore and other members of the family, and although occasionally examined, were not employed for family purposes in the ordinary and common acceptation of that term. It was in proof that on two or three occasions a few of the pieces of plate bought by the first Mrs. Fillmore were employed at public receptions as ornaments to decorate the table and rooms of the house; but the evidence wholly negatives the idea that they were used for family purposes generally. So, also, the wines acquired by Mr. Fillmore while he was president, and which were associated with Commodore Perry's expedition to Japan, were never used for family, or, indeed, for any other purpose, so far as appears. It is to be inferred that they were acquired by him as a gift, or present, from some officer of the Japanese expedition, and whatever might have been his intention as to their ultimate disposition, it is quite certain that he never intended them for ordinary or extraordinary family purposes, for it affirmatively appears that they were never so used during or after his lifetime. Whenever the family had occasion for the use of such wines they were invariably purchased for the purpose. The other articles mentioned are too trivial in value to merit particular notice, and it is enough to say that trunks bought and used by Mr. Fillmore for his individual use, and property which had for a long time been excluded from the house as an incumbrance and obstruction, were not within the meaning of the language of the contract.

We are, therefore, of the opinion that the judgments of the courts below should be reversed and a new trial ordered, with costs to abide the event.

All concur.

Judgment reversed.

Statement of case.

ELIAS A. MEAD, Respondent, v. CHARLES E. PARKER,
Appellant.

111	269
119	355
111	259
135	384

111	259
162	455

Where, in an action upon a guaranty of collection of a debt, the defense is, that the debtor was not prosecuted with due diligence, evidence that a delay in prosecution was with the acquiescence of the guarantor, is competent, on the part of the plaintiff, as bearing upon this issue.

Proof of such acquiescence is also competent, as showing a waiver by the guarantor of his strict right to take advantage of the creditor's indulgence, to avoid the guaranty.

(Argued October 8, 1888; decided November 27, 1888.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 22, 1886, which affirmed a judgment in favor of plaintiff, entered upon a verdict, and affirmed an order denying a motion for a new trial. (Reported below, 41 Hun, 577.)

The nature of the action and the material facts are stated in the opinion.

James R. Cox for appellant. Plaintiff's laches and neglect to collect for two and a half years discharged the guarantor. (*Ins. Co. v. Wright*, 76 N. Y. 447; *McMurray v. Noyes*, 72 id. 524; 6 Cowen, 624; 1 Wend. 455; 31 Barb. 94; 15 Hun, 346.) Every possible test which can be applied, shows that this covenant of defendant was "an agreement to answer for the debt and default of others," and nothing else. (21 N. Y. 415; 26 Wend. 435; *Ackley v. Parmenter*, 98 N. Y. 425; *Milks v. Rich*, 80 id. 269; *Johnson v. Gilbert*, 4 Hill, 178; *Cardell v. McNiel*, 21 N. Y. 336; *Bruce v. Burr*, 67 id. 237; *Brown v. Curtis*, 2 id. 225; *Fowler v. Clearwater*, 85 Barb. 146; *Brown v. Curtis*, 2 Comst. 225, 229, 528.) By the written agreement this defendant contracted for diligence in collecting the bond and mortgage. (*Hill v. Blake*, 97 N. Y. 218; *Drake v. Seaman*, id. 233; *Holcombe v. Munson*,

Statement of case.

103 id. 682; *Tusca v. Eisner*, 53 N. Y. Sup. Ct. Rep. 443; *Kane v. Cortesy*, 100 N. Y. 132; *Brigg v. Hilton*, 99 id. 519.) The guarantor can only be held by the precise terms of his contract. (*Gates v. McKee*, 13 N. Y. 232; *People v. Chalmers*, 60 id. 158; *Kingsbury v. Westfall*, 61 id. 356; *Evansville v. Kaufman*, 93 id. 281.)

H. V. Howland for respondent. Written contracts may be varied, waived and modified by parol, and after the parol arrangement has been acted upon and carried out by one side, the other will not be heard to deny or repudiate it, is as well settled as any legal proposition can be. (*Mosier v. Waful*, 56 Barb. 80; *Proctor v. Thompson*, 13 Abb. N. C. 340; *Lobdell v. Lobdell*, 36 N. Y. 327; *Freeman v. Freeman*, 51 Barb. 306; *S. C.*, 43 N. Y. 34; *Hugus v. Walker*, 12 Penn. 173; *Dana v. Wright*, 23 Hun, 29; *Miller v. Ball*, 36 N. Y. 286; *Beardsley v. Dently*, 69 id. 277; *Knapp v. Hungerford*, 7 Hun, 588; *Dodge v. Welman*, 1 Abb. Ct. App. Dec. 512; *Stone v. Sprague*, 20 Barb. 509.) If the parties to this guaranty afterwards verbally agreed to give the principal debtor further time in which to pay the debt, and the same was acted upon, it was a valid modification of the original contract in respect to the time for the enforcement of the collection from the debtor. (*Homer v. Guardian Mut. L. Ins. Co.*, 67 N. Y. 478; *Burt v. Saxton*, 1 Hun, 551; *Fleming v. Gilbert*, 3 Johns. 528; *Clark v. Dales*, 20 Barb. 64; *Stone v. Sprague*, Id. 509; *Flynn v. McKeon*, 6 Duer, 203; *Dodge v. Crandall*, 30 N. Y. 304.) Delay of collection or postponement must be without his consent in order to discharge the indorser or guarantor. (*Hart v. Hudson*, 6 Duer, 304; *Bangs v. Strong*, 7 Hill, 250; *Fleming v. Gilbert*, 3 Johns. 528; *Gahn v. Niemcewicz*, 11 Wend. 312; *Pike v. Nash*, 3 Abb. Ct. App. Dec. 610; *Might v. Storrs*, 6 Bosw. [N. Y.] 600; *Carlies v. Estes*, 31 Vt. [2 Shaw], 653; *Adams v. Way*, 32 Conn. 160; *Chester v. Bank of Kingston*, 16 N. Y. 338; *Ex parte Harvey*, 27 Eng. L. & Eq. 280; *Wyke v. Rogers*, 12 id. 162; *Woodcock v. O. & W. R. Co.*, 21 id. 285.)

Opinion of the Court, per PECKHAM, J.

PECKHAM, J. This action was commenced to recover the balance due upon a bond and mortgage, the latter of which had been foreclosed and a judgment for deficiency entered against the mortgagor. The liability of the defendant herein rests upon a guaranty which he signed and by which he guaranteed the collection of the bond to one Cordial S. Jennings, by whom it was assigned to the plaintiff.

The defendant, among other things, set up that the plaintiff had extended and put off the time for the payment of the bond and mortgage without the consent of the defendant.

The bond became due and payable by its terms May 1, 1875. It was assigned by the mortgagee to Charles E. Parker, the defendant, on the 10th of May, 1872. The defendant assigned it to Jennings on the 1st of September, 1875, and Jennings assigned it to the plaintiff on the 1st of April, 1876. The action to foreclose the mortgage was commenced in March, 1878, three years after the mortgage became due, and two years after the assignment by Jennings to the plaintiff.

Unexplained, the delay of the plaintiff in commencing suit to foreclose the mortgage and thereby obtain payment of the bond would be a good defense to the surety, for the neglect would be unreasonable, and unreasonable neglect itself discharges a surety of this nature.

Upon the trial of the action evidence was given tending to show acquiescence of the defendant in the delay, both on the part of Jennings, while he was the owner, and on the part of the plaintiff after he became the owner. If competent, we think there was sufficient evidence in the case to go to the jury upon the question of such acquiescence in or ratification on the part of the defendant of the delay in commencing the suit. The defendant, however, objected to the evidence in question on the ground that it was by parol, and incompetent for that reason, as tending to vary the contract of guaranty between the parties, which, on the part of the defendant, was a contract to answer for the debt, default or miscarriage of another, and required by statute to be in writing. The evidence was admitted and upon it a verdict was obtained in

Opinion of the Court, per PECKHAM, J.

favor of the plaintiff for the amount of the deficiency upon the foreclosure sale. Appeal was taken from the judgment entered upon the verdict of the jury to the General Term, where it was affirmed, from which affirmance defendant appeals here.

The learned counsel for the defendant made a most exhaustive argument upon the question of the admissibility of the evidence going to show what he claimed was a new contract, or would have been a new contract if sufficiently proved, varying the terms of the written contract of guaranty made by the defendant. This contract he claimed was required to be in writing by the statute of frauds.

Although it may be somewhat difficult to distinguish this case from that of *Milks v. Rich* (80 N. Y. 269), yet without pausing to determine definitely that question, we think there is another view upon which this judgment can and must be sustained. The defendant guaranteed the collection of the bond and mortgage. That guaranty was simply an undertaking on his part that the debt would be paid if the principal should be prosecuted with reasonable diligence. (*Craig v. Parkis*, 40 N. Y. 181; *Northern Ins. Co. of N. Y. v. Wright*, 76 id. 445.) If the facts were undisputed and were such that different inferences could not be drawn therefrom by different minds, the question whether reasonable diligence had been exercised in commencing the suit for the collection of the bond would be one of law. But under the law, as it now stands in relation to such matters, if the facts are disputed or if undisputed, they are of such a nature that reasonable men might differ in regard to the inferences proper to be drawn from them, then those inferences are to be drawn by a jury under proper instructions from the court. But whether a question of fact or of law, it is still a question of whether reasonable diligence has been shown. In relation to such a question as this in *Thomas v. Woods* (4 Cow. 173), WOODWORTH, J., observed: "Every question of due diligence must be decided in view of all the facts and circumstances, what would be a lache in one case might be reasonable diligence in another. It will not be contended that due diligence requires a prose-

Opinion of the Court, per PECKHAM, J.

uction to be commenced in every case on the day the money is payable. If a party intends that he will guard his contract, as in the case above cited, where the plaintiffs covenanted to prosecute immediately after the several sums of money became due." In *Ten Eyck v. Elmendorf* (1 Caines, 427), upon such a guaranty THOMPSON, J., said: "The plaintiffs were to use all due diligence and take all legal measures, by prosecution at law, to recover the money from Redington, by which I understand all ordinary and legal measures prosecuted with good faith." Certainly it is a circumstance, and one of a most material and controlling nature, upon the issue as to whether due diligence had been used in the prosecution of the claim, to show that failure to prosecute was, by reason of the express request of the defendant himself, or by reason of his acquiescence in or consent thereto after receiving full information of the facts from the plaintiff. No man could say upon an issue of due diligence that a plaintiff had failed to exercise it by commencing his action against the principal debtor when, in justification of such failure, he showed a parol request of the surety to refrain from the commencement of the action until a certain time had elapsed within which he said he had no doubt that the principal debtor would pay. It certainly is competent evidence, as showing the circumstances in existence, which rendered the action of the plaintiff reasonably diligent in prosecuting the suit to foreclose the mortgage, and it did not in any degree alter the contract which was made by the defendant in writing.

In *Northern Insurance Company v. Wright* (*supra*), it is clear that the parol evidence which was admitted was offered on the question of the waiver, by the defendant, of the strict performance of the contract by the plaintiff. CHURCH, Ch. J., in that case says: "Waiver is largely a question of intention, and it seems difficult to impute such an intention to the defendant from the circumstances proved, after he had in express terms demanded a foreclosure and disclaimed liability, until a deficiency was ascertained. The evidence is conflicting as to whether he told the president he had taken a deed."

Opinion of the Court, per PECKHAM, J.

This quotation shows that evidence of that nature was admissible upon the question of waiver, and that no one supposed that it was rendered inadmissible for that purpose because of the assumed alteration, by parol, of the contract required to be in writing, by the statute of frauds. The evidence in this case was not of such a nature as could be said to alter the contract. It was simply of such a nature as to show that the defendant waived the strict performance of its original requirements.

Again, it has been frequently held, in cases where the creditor was bound to diligence in pursuing by action at law his debtor in order to hold the guarantor, that if the creditor indulges the debtor by not enforcing payment of the debt by suit, if such indulgence be with the acquiescence of the guarantor the guarantor thereby waives his strict right and cannot afterwards take advantage of the creditor's indulgence to avoid his own contract. (*Wright v. Storrs* 6 Bosw. 600; *Theobald on Principal and Surety*, 87, § 165; *Woodcock v. Oxford & Worcester R. R. Co.*, 21 Law & Eq. R. 285; *Cummings v. Arnold*, 3 Metc. 486; *Adams v. Way*, 32 Conn. 160-172.)

The General Term in this case held that the evidence was properly admitted to prove the waiver and consent on the part of the defendant; and it also held that the evidence was properly received because it was not necessary for the validity of the defendant's guaranty that it should have been in writing; that the guaranty was not in law a contract to answer for the debt, default or miscarriage of another, but that it was an original undertaking to pay his own debt.

As we have said, we do not feel compelled to discuss the latter ground, and hold that the evidence was properly admitted as tending to show due diligence under all the circumstances and a waiver by the defendant of strict performance on the part of the plaintiff; and if believed, there was sufficient evidence in the case to support the verdict.

We are concluded by the finding of the jury on that issue, and for these reasons the judgment should be affirmed with costs.

All concur.

Judgment affirmed.

Statement of case.

ANNA K. GILMAN et al., Respondents, v. WINTHROP W.
GILMAN, Appellant.

111	265
141	345

The will of G. gave to his wife, so long as she remained his widow, "for her own use and occupation, and none other," one-third of his "mansion-house." The other two-thirds the will declared were to be for the use of such of the testator's children by his said wife as might choose to occupy the same. In case none of them so chose, the wife was to have the use of the whole. The provisions made in the will for the wife were declared to be in lieu of dower. His residuary estate the testator gave to his children. Upon the death of the testator the widow waived the provisions for her in the will and claimed dower, and provision was made for her by a court of competent jurisdiction. Defendant, a son of G. by a former wife, took possession of three rooms in the mansion; another heir occupied a fourth and the remainder was unoccupied. In an action of ejectment, brought by the children of the testator by his second wife, it appeared that they made a formal demand of defendant for possession of the whole house, and required him to move out at once. He offered to leave as soon as he could find another place, and expressed a willingness for them to move in without delay, and it did not appear that at any time he denied plaintiffs' right to any part of the premises; about two months after the demand he did move out. The court charged the jury that the plaintiffs were entitled to recover possession of two-thirds of the premises, with damages. *Held*, error; that the portion the widow refused became part of the residue and vested under the will in his heirs, and, among them, the defendant, and so the parties were tenants in common; that plaintiffs failed to prove that they had been actually ousted, or that there had been any denial of their rights as co-tenants, in the absence of which proof they were not entitled to recover. (Code of Civ. Pro. § 1515.)

Defendant's answer was a general denial. *Held*, that this was substantially a denial that defendant was guilty of unlawfully withholding the premises as alleged in the complaint, and under it defendant was entitled to prove any matter which would defeat the action, and the burden was upon plaintiffs of showing a right to the possession of the premises as against defendant at the time of the commencement of the action.

The court charged that plaintiffs were entitled to recover, as damages, the value of the use of two-thirds of the premises from the time of demand up to the trial. *Held*, error; that they were only entitled to recover, if at all, damages up to the time of the surrender of the premises.

(Argued October 10, 1888; decided November 27, 1888.)

Statement of case.

APPEAL from a judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made July 31, 1886, which affirmed a judgment in favor of the plaintiff, entered upon a verdict and affirmed an order denying a motion for a new trial.

This was an action of ejectment.

The plaintiffs stated in their complaint that, on the 8th day of February, 1865, they were possessed of two undivided third parts of the mansion-house and lot of Nathaniel Gilman, deceased, known as 171 Clinton street, in the city of Brooklyn, having the right to use and occupy the same for their respective lives, subject to the right of Theophilus Gilman and Frazer Gilman to also use and occupy the premises with them, whenever they should elect to do so; and being so possessed, the defendant, on the 9th of February, 1865, entered into the premises and withholds from the plaintiffs the possession thereof, to their damage \$100. They demanded judgment for the possession of the undivided two-thirds of the mansion-house and lot, with their damages for the detention. The defendant's answer was a general denial of the allegations of the complaint.

The plaintiffs proved that Nathaniel Gilman died in December, 1859, seized of the entire premises, leaving a widow, Joanna Gilman, and four children by her, as named in the complaint, and a will and codicil, which were admitted to probate in the city of New York, May 24, 1861, and in the state of Maine, in June, 1861. They were put in evidence by the plaintiffs. It appeared that the defendant was the eldest son of Nathaniel Gilman by a former wife, and both parties claim under the provisions of the will and codicil; the plaintiffs, under section 1 of the codicil, which is in these words: "To my wife Joanna, so long as she remains my widow, for her own use and occupation, and none other, I give one-third part of my mansion-house and lot in Clinton street, in the city of Brooklyn and state of New York. The remaining two-thirds are to be for the use of such of my children, by her, as may choose to occupy the same; those who may thus occupy being required to pay the

Statement of case.

taxes and assessments thereon, and to keep the premises in repair; but so long as none of my children may wish to occupy, my wife is to have the use of said two-thirds, as well as of the said one-third of the premises." The defendant claims under a clause by which the testator gave to his children, and, among others, the defendant, the rest and residue of his property and estate. The testator declared that the provisions made in the will and codicil for his wife Joanna were intended to be in lieu of dower.

The defendants offered in evidence (1) a paper dated June 11, 1861, and duly authenticated, by which the widow of the testator waived "the provisions made for her in the last will and testament of her husband," and declared that she "claims dower in the real and her rights in the personal estate of deceased according to law;" and (2) proposed to show that upon her application provision had been made for her in lieu of the provisions of the will, by the Court of Probate in the state of Maine, where the testator resided at the time of his death and where he left real estate and personal property. The offer was rejected as not pertinent to the issue, and to the ruling of the court the defendant's counsel excepted. It appeared that, in 1864, the defendant took possession of three rooms in the house in question, another heir of Nathaniel Gilman already occupying a fourth room, leaving the rest of the house unoccupied. In the month of February, 1865, the plaintiffs made a formal demand of the defendant for the possession of the whole house, and required him to move out at once. He offered to leave as soon as he could find another place, but expressed a willingness that they should move in without delay. The upper part of the house was vacant, and all he claimed was a right to occupy a portion of the house then in use. No testimony was given tending to show a demand for less than the whole, and it was in evidence, on the part of the defendant, that he "at no time denied the plaintiffs' right to any part of the premises." In the following April he did, in fact, move out, and has since had nothing to do with them. At the close of the testimony the defendant's counsel

Statement of case.

asked to go to the jury as to the demand made by the plaintiffs, claiming that if it was for the whole of the premises it was not sufficient, but the court refused. He also "asked the court to charge the jury, as a matter of law, that plaintiffs could not recover more than \$100, that being the amount claimed in the complaint. The court ruled that plaintiffs were entitled to recover damages from the time this demand was made down to the then present time.

The court thereupon charged the jury as follows: "The plaintiffs are entitled to your verdict, and to recover possession of two-thirds of the house and lot, the premises described in the complaint, and the only question for you to consider is the amount of damages;" and, as to those damages, directed them to determine, from the evidence, what the fair rental value of the premises was, "and, having ascertained it, give the plaintiffs a verdict for two-thirds of that amount from December, 1864, the time the demand was made, to the then present time." To each ruling and direction the defendant's counsel excepted. The jury rendered a verdict for the plaintiffs, in accordance with the charge of the court, and assessed the damages at \$1,700.

Henry C. Knox for appellant. Before assignment of dower the widow has no estate, but a mere right in action or claim, which cannot be sold upon execution. (*Moore v. Mayor, etc.*, 4 Seld. 113; 2 Comst. 254; Cruise's Dig., title, Dower, chap. 3, § 1, note; *Gooch v. Atkin*, 14 Mass. 378; *Kaine v. Fisher*, 2 Seld. 598; *Sigler v. Van Riper*, 10 Wend. 420; Co. on Litt. 37 b.) The court erred in charging the jury that the plaintiffs were entitled to their verdict, and to recover possession of two-thirds of the house and lot in question, and the only question for them to consider was the amount of damages. (*Sigler v. Van Riper*, 10 Wend. 419; 2 R. S. 306, 307, § 27.)

Raphael J. Moses, Jr., for respondents. The children who derived their title directly from the testator, as to their two-thirds, were unaffected by the action of the widow as to her

Opinion of the Court, per DANFORTH, J.

one-third. (*Clapp v. Brounque*, 9 Cow. 530.) The demand for judgment, "damages for the detention," was ample to justify the proof, actual damages from the time of demand to date of trial. (*Knapp v. Roche*, 62 N. Y. 614.)

DANFORTH, J. We think the appeal should prevail. The evidence in the case and that offered by the defendant was sufficient to show that the original parties to this action were tenants in common of the premises in question. The plaintiffs failed to prove that they had been actually ousted by the defendant, or that there had been, either by word or act on his part, a total denial of their right as such co-tenants. In the absence of such proof they were not entitled to recover. Upon that point the statute is peremptory. (*Sigler v. Van Riper*, 10 Wend. 419; 2 R. S. part 3, chap. 5, p. 306, § 27; Code Civ. Pro, § 1515.) It would, no doubt, have been sufficient if, upon demand made by the plaintiffs, the defendant had denied their title, saying he claimed the whole, and so claiming had continued in possession. But in this case he did neither. The plaintiffs' right was conceded. And unless excluded by the terms of the will, the defendant also, as one of the heirs of Nathaniel Gilman, was entitled to some share under its residuary clause. He was so excluded if the provisions of the will in favor of the widow, and above cited, were effective, otherwise not. She had her election, and the evidence offered would, if received, have tended to show that she not only executed a formal relinquishment of the provisions made by the will, and elected to take her dower, but that provision was made for her by a court of competent jurisdiction in accordance with her demand. No answer to that evidence appears from the record, nor is any suggested by the learned counsel for the respondents. The portion she refused would, under such circumstances, become part of the residue and vest, pursuant to the will of the testator, in his heirs, among whom is the defendant, subject, indeed, to the widow's right of dower, if any there were. But if any, it was a mere right of action, of itself giving no estate. The

Statement of case.

evidence offered, to show waiver of the provisions of the will, should therefore have been received.

The learned counsel for the respondents refers to the pleadings as sustaining, by the defendant's denial, the plaintiffs' claim. No such force can be given to it. If a cause of action existed, it must have accrued before suit brought, and the substance of the answer is, as that of the general issue under the former practice was, that the defendant is not guilty of unlawfully withholding the premises claimed by the plaintiffs as alleged in the complaint. It in no wise, therefore, precluded the defendant from giving in evidence any matter which would defeat the action of the plaintiffs, nor did it relieve the plaintiffs from the necessity of showing a right to the possession of the premises as against the defendant at the time of the commencement of the action. An exception was also taken to the ruling of the trial judge upon the question of damages. The plaintiffs were entitled to recover, if at all, damages for the withholding of possession, but not beyond the time of the surrender of the premises.

The judgment should be reversed and a new trial granted, costs to abide event.

All concur.

Judgment reversed.

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117 626/

CHARLOTTE MEYER, Individually, and as Executrix, etc.
Respondent, v. JAMES P. CAHEN et al., Executors, etc.,
Appellants.

The will of M. gave to his wife certain premises, together with certain personal property, to be received by her in lieu of dower. At the time of the testator's death there was a mortgage upon the premises, the amount of which was about the value of the premises. The widow accepted the provisions. Subsequently the mortgage was foreclosed, resulting in a deficiency. In an action for a construction of the will, *held*, that the widow was not entitled to be allowed the value of the real estate; that under the statute (1 R. S. 749, § 4), she simply took the equity of redemption and was required, as devisee, to pay and satisfy the mortgage.

Statement of case.

Also, *held*, it was immaterial that the testator, in the first clause of his will, directed the payment of his debts as soon after his decease as conveniently could be done.

After giving a legacy of \$1,000, the will gave the testator's residuary estate to his executors, in trust, to be converted into money. At the time of his decease the testator had \$20,000 in a firm in which he was a partner. This he provided should remain in the business at interest, if his partner should assent, the interest to go to his wife as long as she remained unmarried, and if she did not marry again, until her death. The balance of the estate he directed his executors to invest in interest bearing securities, the interest to be paid to his wife as long as she remained unmarried. The fifth clause of the will then provided that, upon the death or marriage of his wife, his executors should convert all the residuary estate into money and divide the same into six parts, to be distributed as directed. In the sixth clause the testator directed his executors, as soon as convenient after his decease, to pay to the beneficiaries named in the fifth clause a certain proportion of the legacies bequeathed to them, amounting, in all, to \$11,000. The clause concluded thus: "Such several payments to be on account of and to be deducted from any share or proportion of my estate which they shall be entitled to receive under the preceding paragraph." The debts of the testator, exclusive of the bond and mortgage and the funeral expenses, amounted to about \$2,000. The testator, aside from the \$20,000 in the firm, owned \$10,000 of personalty. It was claimed by the legatees that the \$11,000 provided for in the sixth clause should be paid from the personalty before the provision for the widow, and that she was only entitled to interest on the residue. *Held*, untenable; that the intention of the testator was to give his wife, during widowhood, the use of all his property, after deducting the \$1,000 legacy.

(Argued October 10, 1888; decided November 27, 1888.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 31, 1886, which affirmed a judgment entered upon a decision of the court on trial at Special Term.

This action was brought by plaintiff individually, and as executrix of the will of Julius R. Meyer, her deceased husband, to obtain a judicial construction of his will.

The provisions of the will in question and the material facts are substantially set forth in the opinion.

E. C. Boardman for appellants. The widow was liable for the deficiency on the foreclosure sale. (1 R. S. 749, § 4.)

Opinion of the Court, per PECKHAM, J.

M. L. Townsend for respondent. The interest on the \$20,000 in the firm of J. R. Meyer & Co., bequeathed to the widow, is a specific legacy. (2 Redf. on Wills, 132, § 7; Id. 136, § 7, subd. 9; Id. 149, subd. 26, 27.) The plaintiff was entitled to dower in the house and lot, freed of the mortgage, as against the testator's heirs-at-law, and the legatees mentioned in the will. (*Bartlet v. Musliner*, 28 Hun, 235; *Collins v. Ferry*, 7 Johns. 277; *Van Dyne v. Thyne*, 19 Wend. 162; *Lewis v. Smith*, 9 N. Y. 502.) By accepting the provisions of the will in lieu of dower, the plaintiff became a purchaser, for a valuable consideration, of the house and lot, and not a naked devisee. (2 Scribner on Dower, 527; Roper on Legacies, 431; *In re Dolan*, 4 Redf. 511; *Williamson v. Williamson*, 6 Paige, 305; *Insenhort v. Brown*, 1 Edw. Ch. 411.) At common law the plaintiff would have had the right to compel the payment of the mortgage by the executors, out of the personal estate of her husband. (2 Greenleaf's Cruise on Real Prop., title 15, ch. 4, §§ 1-27.) The intent of the testator, as expressed in the will, was that the mortgage should be paid by his executors out of his personal estate, and that his widow should not take the house and lot, charged with the payment of the mortgage. (4 Kent's Com. 163; *Power v. Lester*, 23 N. Y. 527; *Warring v. Smith*, 2 Barb. Ch. 119; *Astor v. Miller*, 2 Paige, 68.)

PECKHAM, J. The defendants herein appeal from a judgment of the General Term, affirming that of the Special Term, construing the will of Julius R. Meyer, who died on the 20th of May, 1884. The defendants, Cahen, were appointed executors, and the other defendants are legatees under the will. By the second paragraph of his will the testator gave to his wife, the plaintiff, his house and lot in West Fifty-third street, New York, together with certain books, plate and other personal property, which were to be received in lieu of dower. By the third paragraph he bequeathed to Paula Friedheim the sum of \$1,000, in trust, to be held by the executors of his will until she arrived at the age of twenty-

Opinion of the Court, per PECKHAM, J.

one year, or married. At the time of the execution of the will, and at the time of the death of the testator, there was a mortgage for \$12,000, executed in 1869, by the testator and a former wife, upon the house and lot in Fifty-third street. On the 10th of September, 1885, this mortgage was foreclosed, and the premises sold, resulting in a deficiency of \$2,184, for which sum judgment against the estate was perfected.

The value of the house and lot was found to have been \$12,000 at the time of the death of the testator, and he having by his will given the premises to his widow, she claims that she should be paid that amount from the estate. The defendants object to this construction, and claim that she took simply the equity of redemption in the premises.

The courts below have decided this question in favor of the plaintiff. In this we think they erred. We think the case comes clearly under 1 Revised Statutes, 749, section 4, which reads as follows: "Whenever any real estate, subject to a mortgage executed by an ancestor or testator, shall descend to an heir, or pass to a devisee, such heir or devisee shall satisfy and discharge such mortgage out of his own personal property, without resorting to the executor or administrator of his ancestor, unless there be an express direction in the will of such testator that such mortgage be otherwise paid."

We can give no force to the arguments urged on the side of the widow as against the plain commands of this statute. We do not see that the provisions of 1 Revised Statutes, 740, section 4, in regard to the right of a widow to be endowed out of lands mortgaged before her marriage as against all but the mortgagee or those claiming under him, throw any light on the case, or take it out of the application of the above quoted section of the statute. Nor do we think the argument for the widow is strengthened by the claim that she having accepted the property in lieu of dower is entitled to special and favorable consideration in all questions, the same as if she were an actual purchaser for a valuable consideration. That does not alter the fact that she takes by virtue of the devise

Opinion of the Court, per PECKHAM, J.

in the will of the testator, and it does not take the case out of the operation of the statute in question, which is perfectly plain, unambiguous and effective, and covers, at all points, the case of the widow herein.

The fact that the testator in the first clause of his will directed the payment of his debts as soon after his decease as conveniently could be done we do not regard as material. Such a clause is usually a purely formal one and works no change in the disposition of the testator's property. The statutes provide that all debts and funeral expenses shall be paid first, and a direction in the will to do what the law requires to be done can throw no material light upon the meaning of the will. We think the contention of the defendants is correct, and that the widow should not be allowed the value of the real estate as claimed by her.

One other question arises under this will. The testator, in the fourth clause, provided that all the rest, residue and remainder of his property, real, personal and mixed, and wheresoever situated, of every character and nature whatsoever, should be converted into money. And he gave, devised and bequeathed unto his executors all of such property in trust for the purposes mentioned in his will. At the time of his decease he had in the firm of J. R. Meyer & Co., of New York, \$20,000, and he provided in his will that it should remain there at six per cent interest if his partner should consent to it, and that interest was to go to his wife as long as she remained unmarried. The balance of his estate he directed to be invested by his executors in interest bearing securities, the interest to be paid to his wife as long as she remained unmarried. He then provided for his issue living at the time of his death, but as he left none it is not necessary to refer to that provision. By the fifth clause he provided as follows: "In the event of the marriage or upon the death of my said beloved wife Charlotte Meyer, and there be no issue of my said marriage, or in case there be issue and such issue shall die before attaining the age of twenty-one years, then I direct and empower my said executors hereinafter named, or the

Opinion of the Court, per PECKHAM, J.

survivor or survivors of them, to convert all said the rest, residue and remainder of my property and estate into money, divide the same into six (6) equal parts or shares and to distribute the same in the manner following, to wit:" He then provided for giving legacies to the individual defendants herein, and by the sixth clause directed his executors, as soon as conveniently after his decease, to pay to the parties named in the fifth clause a certain proportion of the legacies bequeathed to them, making in all \$11,000, and, continuing, the testator said: "Such several payments to be on account of and to be deducted from any share or proportion of my estate which they respectively shall be entitled to receive under paragraph fifth of this instrument."

It is found, as a fact, that the debts of the testator at the time of his death, including funeral expenses, but excluding the amount secured by the bond and mortgage, did not exceed the sum of \$2,000; that, in addition to the \$20,000 which he had in the firm, he had \$10,000 of personalty, which has come into the hands of the executors. It is conceded that the \$1,000 bequeathed to Paula Friedhein is to be paid before the payment to the widow, excepting under the second clause of the will, and the defendants claim that the payment of legacies, mentioned in the sixth clause of the will, should be made from the personal estate before the widow should be paid the interest on any balance that might exist.

The testator left, as stated, \$20,000 in the firm and \$10,000 of other personalty. Out of this is to be paid \$2,000 of debts, a \$1,000 legacy, \$2,184, the deficiency judgment, and, if the defendants are right, \$11,000 more to them before the widow is to receive anything, making over \$16,000 to be deducted from the estate of \$30,000; and upon the balance only was the widow, upon this construction, to receive interest during her widowhood. The plaintiff, on the other hand, claims that the legacies are to be postponed in their payment until her remarriage or death.

The will is undoubtedly ambiguous and, to some extent, inconsistent and doubtful in its meaning. In the first part of

Opinion of the Court, per PECKHAM, J.

the will, with the exception of the \$1,000 legacy, he provides for the gathering together of his whole estate, leaving the amount in his firm to remain at six per cent interest, and the interest on the whole is to be paid, by the very terms of the will frequently repeated, to his wife, "as long as she remains unmarried, and if she does not marry again, to be paid to her until her death." The scheme of the will, the main intention of the testator to be gathered from its perusal, is that the wife shall enjoy the estate during widowhood, in all the property of which he died seized, with the exception of the \$1,000 legacy. And in the fifth clause, where he is about to provide for the legacies to the defendants, the provision is plainly made that the executors are to make such payment only in the event of the marriage or upon the death of his wife. Up to this point all is clear sailing. But the sixth clause, by which he directs his executors, as soon as conveniently may be after his decease, to pay unto these various legatees a certain proportion of the amount therein named of their legacies, is utterly at war with everything that has preceded it, if it be held to mean that the payment of these proportions of legacies is to be made during the lifetime and widowhood of his wife. We are to harmonize, as best we can, the various provisions of this will, and determine, so far as possible, the meaning which the testator had at the time he executed it. It has been well said by EARL, J., that, "in the construction of wills, as in the determination of questions of fact and other questions of law, it is not to be expected that absolute certainty can always be attained. Upon questions of fact, it is sufficient that there is a balance of evidence or probabilities in favor of one side or the other of the dispute, and upon such balance courts will rely in deciding the weightiest issues. So, in the construction of written instruments, courts will scrutinize the language used, and, however confused, uncertain and involved it may be, will give it that construction which has in its favor the balance of reasons and probabilities, and will act upon that. The intent of a testator may sometimes be missed, but such is the inferiority of lan-

Opinion of the Court, per PECKHAM, J.

guage and human judgment that such a result is sometimes unavoidable." (*Weeks v. Cornwell*, 104 N. Y. 325.)

We cannot escape the conviction that the testator never intended that the payment of these legacies, or any portion of them, should be made during the time when he had already specifically and repeatedly provided for the payment of the whole interest upon all of his estate, with the exception of the \$1,000 legacy above mentioned, to his wife during her widowhood. What other construction can be given consistent with the language used and the main purpose and intent of the testator? It is suggested that the testator might have had in his mind the death of the widow before his own, and that in such event the payments under the sixth clause would be made as soon after his death as conveniently could be, and within the year ordinarily allowed for the payment of legacies. Or that he might have meant that, after the death of the widow, the payment should be made as soon as conveniently could be under the sixth clause, and the balance under the fifth. The language does not give, it must be confessed, any very strong color looking to the correctness of either of these interpretations, and yet we think we should come much nearer carrying out, in the main, the intention of the testator, as evidenced by the language used in this will, by construing the language in the sixth clause to mean one or the other of the two suggested interpretations rather than to interpret it as providing for the payment of the \$11,000 during the lifetime and widowhood of his wife, and thus overthrow what is seen, from the various provisions he made in regard to it, was the main intention of the testator, namely, provision for his wife during her widowhood, to consist of the use of all of his property during that time, and the fee simple of his house and lot in Fifty-third street, subject to the mortgage, and after deducting the \$1,000 legacy above referred to.

These views lead to a modification of the judgment of the General and Special Terms by striking out from the fifth paragraph of the judgment, as entered at Special Term, all the provisions relating to the payment of the \$12,000 to the

Statement of case.

plaintiff Charlotte Meyer, individually, or at all, and it should be adjudged that the plaintiff is not entitled to such payment, or any part thereof.

As thus modified the judgment should be affirmed, without costs to either party.

All concur.

Judgment accordingly.

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HORACE BUSH et al., Administrators, etc., Respondents, v.
HENRY L. ROBERTS, Impleaded, etc., Appellant.

In an action by creditors of the vendor to set aside a transfer of property, where it appears there was a valuable consideration for the transfer, and there is no proof of conspiracy between the vendor and vendee to defraud the creditors of the vendor, proof of acts and declarations of the vendor showing a fraudulent intent on his part are inadmissible against the vendee. The action is only maintainable on proof of actual notice on the part of the vendee of the fraudulent intent, or knowledge of circumstances equivalent to such notice. Notice or knowledge may not be made out from declarations of the vendor.

(Argued October 10, 1888; decided November 27, 1888.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made April 20, 1886, which affirmed a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term.

The plaintiffs, as administrators of one Henry T. Wakefield, deceased, brought the present action to have set aside and declared fraudulent and void, as against a judgment recovered by them, a certain conveyance of real and personal property made by defendant Orrin G. Robbins, to defendant Henry L. Roberts. The defendant Robbins did not appear or defend in the action, and the trial was had upon the issues raised by the answer of the defendant Roberts. At the time of the death of the intestate, Wakefield, on November 29, 1883, the defendant Robbins, in whose employ the intestate had been

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Statement of case

for many years, was largely indebted to him. That indebtedness was, to some extent, secured by mortgages on a portion of Robbins' farm, and to some extent was unsecured. The judgment, which is the basis of the plaintiff's complaint, was obtained against Robbins on January 10, 1884. The conveyance which is attacked was made on December 7, 1883, and affected a portion of Robbins' farm, which was not covered by the mortgages, and a large amount of personal property located upon it. The consideration for the conveyance was \$7,500; which the trial judge found on the evidence to be \$1,600 less than the value of the property transferred. At the time of the execution of the conveyance Roberts gave his due bill for the purchase-price, and the deed and due bill were deposited with a third party for three days, when the parties met and the deed and bill were delivered to them as they were respectively entitled thereto under the transaction of sale. Within a few days afterward the deed was recorded and the due bill paid, less the amounts of a judgment for \$500 recorded against Robbins and of some unpaid taxes. Soon thereafter Robbins disappeared and was not seen again in that locality.

The further facts, so far as material, are stated in the opinion.

Watson M. Rogers for respondent. The burden of proof was upon the plaintiffs to establish every element from which the alleged fraud was sought to be inferred. (Bump on Fraud. Con. 237, 557; 1 Greenl. on Ev. § 80; *Herman v. Heard*, 62 N. Y. 448; *Schultz v. Hoagland*, 85 id. 464, 467; 13 Viner's Abridg. 515; *Hardman v. Bowen*, 39 N. Y. 200; *Nugent v. Jacobs*, 103 id. 125.) It cannot be properly urged that the price paid furnished any evidence of fraud. (Wait's Fraud. Con. § 232; Bump on Fraud. Con. 237, 238.) It was lawful for Robbins, even if insolvent, to sell his property and pay his debts. (*Ruhl v. Phillips*, 48 N. Y. 125; Bump on Fraud. Con. 234, 235.) And this is so, notwithstanding the effect of it may have been to prefer some creditors over others. (*Bank v. Fitch*, 48 Barb. 344; *Beards v. Wheeler*, 76 N. Y.

Statement of case.

213; Wait's Fraud. Con., § 390.) The burden was on the plaintiff to show a fraudulent intent, and facts not found are negatived by implication. (15 Week. Dig. 146; *Schultz v. Hoagland*, 85 N. Y. 464-467; *Jaeger v. Kelley*, 52 id. 274; *Wilson v. Perwit*, 103 U. S. 22.) Roberts being an innocent purchaser for a valuable consideration without notice, his title was good. (3 R. S. [7th ed.] 2330, § 5.) As between the parties, however fraudulent against creditors, the conveyance was binding. (Wait's Fraud. Con. § 395.) The assumption of a new liability is a sufficient consideration to constitute the party assuming it a purchaser in good faith. (*Williams v. Sheeley*, 37 N. Y. 375-378; *Matthews v. Rice*, 31 id. 457; *Seaman v. Hasbrouck*, 35 Barb. 151; *Platt v. Town of Orleans*, 99 U. S. 676-679; Wait's Fraud. Con. § 372; *Grocers' Bk. v. Penfield*, 65 N. Y. 502; *Murphy v. Briggs*, 89 id. 446.) Declarations made by the payee of a negotiable promissory note, while he owns it, are not admissible against one to whom it is subsequently transferred for value, though the transfer is after maturity. (*Paige v. Cagwin*, 7 Hill, 361; *Truax v. Slater*, 86 N. Y. 631; *Bullis v. Montgomery*, 50 id. 352; *Flynn v. Wheeler*, 40 Hun, 125; *Vidvard v. Powers*, 34 id. 221; *Wilds v. N. Y. C. R. R. Co.*, 95 N. Y. 274.) Assuming the grant to have been fraudulent, a reconveyance by Roberts would have purged the fraud and relieved him from all liability. (*Cramer v. Blood*, 57 Barb. 163; Bump on Fraud. Con. 467; *Murphy v. Briggs*, 89 N. Y. 446-453.)

Thomas S. Jones for respondents. The conveyance in question is void, because it was made by defendant Robbins with intent to hinder, delay and defraud his creditors. (3 R. S. [7th ed.] 2329, § 1.) As defendant Roberts had notice of the fraudulent intent of defendant Robbins, he is not entitled to protection as a purchaser for a valuable consideration. (3 R. S. [7th ed.] 2330, § 5; *Parker v. Conner*, 93 N. Y. 118-128; *Roeber v. Bowe*, 26 Hun, 554; *Stearns v. Gage*, 79 N. Y. 102-107; *Starin v. Kelly*, 88 id. 418.) A person who pays

Opinion of the Court, per GRAY, J.

the purchase-money after knowledge of his grantor's fraudulent purpose is not a *bona fide* purchaser. (*Hunsinger v. Hoffer*, 11 N. E. Rep. [Ind.] 463; *Rhodes v. Green*, 36 Ind. 7; *Anderson v. Hubble*, 93 id. 570.)

GRAY, J. Various facts, which he decided to be proved by the evidence, led the learned trial judge to conclude that the transfer of property by the defendant Robbins to the defendant Roberts was made with the intent to hinder, delay and defraud creditors, and, therefore, was void; but in the chain of evidence leading to his conclusion, which seems, so far as it establishes knowledge in the vendee, not very weighty, was a conversation had between one of the plaintiffs and Robbins, shortly after the death of the intestate, and prior to the transfer of the property. The evidence of this conversation was elicited on the opening of the plaintiffs' case. Bush, one of the plaintiffs, had testified to a visit, which he and his co-administrator had made to Robbins' house for the purpose of taking possession of the effects of their intestate, and that on that occasion he had a conversation with Robbins "upon the subject of the claims of this estate held against him and this property." He was asked by plaintiffs' counsel to state that conversation. This was objected to by counsel for defendant Roberts, who alone had appeared and was defending the action, on the ground that it was incompetent and immaterial as against that defendant; but the objection was overruled and the evidence was received. The witness thereupon testified to the statements made by Robbins in the course of the conversation.

It seems to us evident that these statements were deemed of importance and material by the trial judge, because, in his ninth finding of fact, after stating the circumstances of the plaintiff's visit to Robbins' house, he incorporates them. He finds that plaintiffs "had conversation with defendant Robbins, who, in reply to questions put to him by Bush, one of the plaintiffs, informed them that he was a large debtor to said estate; that it had been allowed to run for years with-

Opinion of the Court, per GRAY, J.

out interest being paid, and he didn't know just how much it was," and other facts which Robbins stated then about the quantity and value of his property. The materiality of the evidence of these declarations of Robbins, obviously, was in their bearing upon Roberts' solvency and his motives and intent as deducible from his admissions, his misrepresentations and his conduct. Roberts, however, was a purchaser for a valuable consideration, and there was no proof establishing any conspiracy between him and his vendor, Robbins, to defraud Robbins' creditors. The force of the action was directed against Roberts, to deprive him of the property which he had bought, and the action could only prevail by proof that he had actual notice of a fraudulent motive on Robbins' part, or knowledge of circumstances which was equivalent to such notice. If he knew, or had believed the motives of his vendor to be fraudulent, then, by aiding him in his scheme, he made himself a party to the fraud. (*Parker v. Conner*, 93 N. Y. 118.) But no evidence is competent proof to affect him, or his right to the possession of his property, which falls short of proving the nature of the transaction, and of illustrating the guilty participation of the vendee. If this was a case of a conspiracy to defraud Robbins' creditors, admitted or proved, the admissions or declarations of either would be competent as against the other; the principle of their admissibility assuming the fact of the conspiracy being established. (*Cuyler v. McCartney*, 40 N. Y. 221-228.) But this is not such a case, and no proof is admissible as against Roberts, of acts or declarations of Robbins, unless as part of the *res gestæ*, or, unless falling within the rule of admissibility, as being against his, Roberts, interest, and the fact that Robbins is a party defendant does not make them so.

In order that the declarations of a party, which are claimed to be part of the transaction, may be admissible, they must grow out of the principal fact or transaction, illustrate its character, be cotemporaneous with it and derive some degree of credit from it. (*Lund v. Tyngsborough*, 9 Cush. 36.) But

proof of the declarations or misrepresentations of Robbins respecting his indebtedness and the value of his property, made before the transfer and before even the negotiations for any transfer, is not competent against Roberts; for they in no sense formed a part of the subsequent transaction between them, and their admission into the case to charge Roberts with the liability to restore the property is, we think, clearly a violation of the principles of evidence in such cases and without support in authority. The question here is whether Roberts had actual notice of Robbins' intent, or the knowledge of circumstances connected with Robbins' act in disposing of his property to defraud his creditors. Did he, for his own advantage, or with no such idea, make himself a participant in the fraudulent plan? Unless the proofs are confined within the limits of charging Roberts with such a participation, the safeguards designed by the rules of jurisprudence as a protection to those who act in good faith and with honest motives are endangered. The trial judge found as facts the existence of the fraudulent intent in the vendor, Robbins, and of notice in the vendee, Roberts, of that intent; but these findings, it is manifest from his decision, rested more or less on the statements of the vendor to the plaintiff Bush. While expressing no opinion here as to the general merits of the case, or as to the weight of the proof, we do say that in a case of such a nature, where the proofs are conflicting and not clearly preponderating against the defendant, the erroneous admission or exclusion of evidence was likely to have affected, in a material degree, the conclusions of the judge.

We see no reason why the principle of the decisions in the cases of *Tousley v. Barry* (16 N. Y. 500), and of *Truax v. Slater* (86 id. 632), should not control in the present case. In *Tousley v. Barry*, JOHNSON, Ch. J., decided that the admission of a previous owner of a chose in action cannot be proved against a purchaser from him, who has bought for a fair consideration and between whom and the former owner there exists no other relation than that of purchaser and seller; that it was not the case of a nominal purchase; the former

Statement of case.

owner retaining the equitable interest, but of an actual and complete transfer of all interest to the purchaser.

In *Truax v. Slater*, EARL, J., held that "the mere declarations of an assignor of a chose in action, forming no part of any *res gestæ*, are not competent to prejudice the title of his assignee, whether the assignee be one for value, or merely a trustee for creditors and whether such declarations be antecedent or subsequent to the assignment."

We think, for the error pointed out, the judgment should be reversed and a new trial granted with costs to abide the event.

All concur.

Judgment reversed.

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115	455
111	284
140	205

In the Matter of the Final Accounting of NOAH SELLECK, as
Executor, etc.

An executor has no authority to credit in his accounts items not constituting a legal charge against the fund in his hands.

Credits, therefore, for payment of taxes not a lien on property of the testator at the time of his death, or on property not owned by the testator, and credits for payments made by the executor, by request of heirs, and for which the estate was not liable, are improper and may not be allowed upon settlement of the executor's accounts.

Upon settlement of the accounts of an executor, the surrogate disallowed a credit of \$62.50, claimed to have been paid to a surrogate many years previously. The surrogate disallowed it because there was neither a voucher nor a sufficient explanation for the payment. The General Term of the Supreme Court allowed the credit. *Held*, error.

The executor, under a power of sale contained in the will, sold a lot to D. No debit for the purchase-money was made in his account. The executor explained that the payment was made by withholding from D. moneys coming to him from the trust estate. *Held*, that it should have been entered in the accounts; and that he was properly charged therewith by the surrogate.

Under the Code of Civil Procedure (§§ 2557-2559, 2570), it is within the discretion of a surrogate, upon the settlement of the accounts of an executor or testamentary trustee to award costs "payable by the party personally or out of the estate or fund as justice requires;" and, while the exercise of this discretion is so qualified by the words "as justice requires" as to authorize the interposition of the General Term, where there has been an

Statement of case.

abuse of discretion and a violation of justice, it has no other power of review.

When the General Term reverses a surrogate's decree, imposing costs upon an executor or trustee personally, it must appear in the order of reversal that the ground therefor was the abuse of discretion by the surrogate; in the absence of this statement, the order is not sustainable.

While, when upon a final accounting of a testamentary trustee, it appears that the annual income of the trust estate was distributed to the beneficiaries, the trustee may be allowed full commissions annually, although he did not account annually, the fact that the income was received and distributed monthly, does not authorize the trustee to charge full commissions monthly.

An executor was charged with moneys received from heirs to pay a mortgage upon the testator's real estate. *Held*, in the absence of evidence that the executor withheld or appropriated the money, he was not properly charged with interest thereon.

(Argued October 12, 1888; decided November 27, 1888.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made July 23, 1886, which reversed two decrees of the surrogate of the county of Richmond, one on final settlement of the accounts of Noah Selleck as executor of the will of David Decker; the other, settling the accounts of said Selleck as trustee under said will, and which directed said surrogate to settle and adjust the accounts as therein prescribed.

The facts, so far as material, are stated in the opinion.

William B. Hornblower for appellant. As the order of General Term does not state that the reversal was upon questions of fact, it must, therefore, be deemed to have been upon questions of law only. (*Foster v. Persch*, 68 N. Y. 400.) The first and most imperative duty of a trustee is to keep correct books of account, in which everything relating to the estate shall be set down in so clear and distinct a manner that any of the beneficiaries could, at any moment, by a simple inspection, get an accurate idea of the condition of the estate. (Lewin on Trusts [1885, Eng. ed.] 993, § 27; Perry on Trusts, § 821; 2 Story Eq. Jur. § 1275; 3 Williams on Executors [6th Am. ed.] 2156.) The award of costs against Mr. Selleck,

Statement of case.

personally, was in the discretion of the surrogate, and of the surrogate alone. (Code, §§ 2557, 2558; 2 R. S. 67, § 62; *Marvin v. Marvin*, 11 Abb. Pr. [N. S.] 97; *In re Collamer*, 5 St. Rep. 196, 199, 200.)

William R. Baird for respondent. The surrogate erred in striking out of the executor's account the item of two dollars, February 15, 1871, for traveling expenses. (Code of Civ. Pro. § 2734; *Elliot v. Lewis*, 3 Edw. Ch. 40.) Even as contended by the heirs, had the executor's system of calculating been erroneous, they having acquiesced in it for fourteen years, and understood his system of charges, cannot now be heard to say that he improperly retained them, or question his right to do so, or their amount. (*Hancox v. Meeker*, 95 N. Y. 528; *Hurlburt v. Durant*, 88 id. 120; *Embury v. Connor*, 3 id. 522; *Clemens v. Clemens*, 37 id. 74; *Bloomer v. Sturgis*, 58 id. 176; *Jordan v. Van Epps*, 85 id. 436; *Pray v. Hegeman*, 98 id. 351; *Gates v. Preston*, 41 id. 113; *Newton v. Houck*, 48 id. 676; *Demarest v. Darg*, 32 id. 281.) The contestants could not properly object to the payments made by the trustee to them, to the rate of his commissions, or the amount and number of his disbursements; the entire question being *res adjudicata* previous to the initiation of those accountings. (*Gates v. Preston*, 41 N. Y. 113; *Newton v. Houck*, 48 id. 676; *Demarest v. Darg*, 32 id. 381; *Sheldon v. Edwards*, 35 id. 287; *Le Guen v. Gouverneur*, 1 Johns. Cas. 436; *Brown v. Mayor, etc.*, 66 N. Y. 391; *Leavitt v. Walcott*, 95 id. 212; Code Civ. Pro. § 1209.) As the contestants filed no exceptions to the referee's report as to the executor's accounts, and as they moved to confirm the report and did not except to it, they are bound by it as a judicial admission. (*Ward v. Craig*, 87 N. Y. 551; *Glacius v. Fogel*, 88 id. 435; *Norton v. Woods*, 22 Wend. 522; *White v. Merritt*, 7 N. Y. 352; *Gates v. Preston*, 41 id. 113; *Demarest v. Darg*, 32 id. 281.) The executor and trustee was properly awarded costs, to be paid out of the estate by the General Term. (*Lawrence v. Lindsey*, 70 N. Y. 566; *Schell v. Hewitt*, 1

Opinion of the Court, per GRAY, J.

Dem. 249; *Murtha v. Curley*, 92 N. Y. 453; Code Civ. Pro. § 2557.

GRAY J., From a careful consideration of the questions brought up by this appeal, we have been led to conclude that the order of the General Term, reversing the decrees of the surrogate upon these accountings, cannot be sustained.

An expression of the views, which have influenced this conclusion, seems to be called for in some instances in this record.

In the accounts filed by the executor, the surrogate disallowed certain items, amounting in the aggregate to the sum of \$477.01 and commissions of \$146.57. The items so disallowed related to the payments of taxes. The reasons assigned by the General Term for restoring these items to the account were that the heirs received the benefit, and they are the same persons who take the benefit under the decree. This reasoning is not only unsatisfactory; but it is evident that they have misapprehended the grounds upon which the surrogate's decree was based. It appears that, in one or two instances, the payments of taxes covered some of the real estate of which testator died seized; but that there was no proof given to show what portion of the tax was in fact imposed upon that real estate, and being unable to separate it from the tax imposed upon the real estate owned by other persons, the entire charge in such instances was disallowed.

As to other payments of taxes the surrogate disallowed them, for the reason that the real estate was owned by the heirs, and there was no warrant for their payment by the executor. In addition, the proof showed, as the report states, that though the amounts in particular instances were repaid by the heirs, the executor did not credit the estate in account with their receipt. I cannot find any warrant in law for the entry by an executor in his accounts of items not constituting a legal charge against the fund in his hands. Payment of taxes not a lien on property of the testator, at the time of his death, or of taxes upon property not owned by the testator, is without reason or authority in the statute. Payments made

Opinion of the Court, per GRAY, J.

by an executor by request of heirs, for which the estate was not liable, constitute a personal transaction between them, and they have no more place in his accounts than any other dealings which he may have with them, in which he has resort to the funds of the estate. His duties are clearly defined by statute, and there is no legal warrant for his departure therefrom, because of the requests of the heirs or next of kin.

Other instances of disallowed payments of taxes are clearly explained in the admissions of the executor, or in the failure of any proof of their having been liens on property of the estate. From the disallowance of these items in the executor's accounts, the change in the allowance of commissions naturally followed as made by the surrogate. The General Term added to the credit side of the account an item of \$62.50 as "surrogate's bill." This was clearly wrong. The executor claimed to be allowed the item, as a payment made many years previously to a surrogate. The surrogate here disallowed it because there was neither a voucher nor a sufficient explanation for the payment. They were clearly right in so holding, and the General Term without justification in adding it as a credit.

The surrogate added to the executor's receipts items, aggregating the sum of \$263.25, all of which, except the sum of five dollars, the General Term decree refused to sustain. The few words in the opinion of the General Term, in respect to the matter, are insufficient, either as explanation or reasoning. The surrogate added the items, because the executor's testimony established them as credits to the estate. In respect of the sale of a lot to John Decker for \$200 (part of this sum of \$263.25), the executor sold it as such, under the power in the will to pay debts. He says the payment was made by withholding moneys coming to Decker from the trust estate; but that is no reason for not entering it in the executor's account as a credit to the estate.

Our review of the questions arising on the accounting of the executor leads us to the conclusion that the surrogate committed no error in settling the same. By the decree, the costs and disbursements of the accounting, amounting to \$1,525.57,

Opinion of the Court, per GRAY, J.

were cast upon the executor personally, for reasons stated in the referee's opinion, and which had reference to the proofs as to his conduct and to his responsibility for the necessity and expense of a long reference.

The order of the General Term, with reference to the payment of the costs below, uses this language: "That he should be further allowed * * * his costs, allowances and disbursements upon the proceedings herein heretofore had, to be taxed and to be deducted from the net balance so found as above remaining in his hands." We must assume, and counsel agreed to that effect, that the reversal of the surrogate's decrees, with the above direction in the order, is a reversal of that part of his decree which directs the executor to pay personally the costs and disbursements, and is a direction that they be paid out of the estate.

We think this action of the General Term is clearly an error, and that it is unwarranted by statute. By section 2557 of the Code of Civil Procedure, "costs awarded by a decree may be made payable by the party personally, or out of the estate or fund, as justice requires," and by section 2558, "the award of costs in a decree is in the discretion of the surrogate;" except in cases of which this is not one. By section 2570, "an appeal to the Supreme Court may be taken from a decree of a Surrogate's Court, or from an order affecting a substantial right," etc. By section 2589, "the appellate court may award to the successful party the costs of the appeal; or it may direct that they abide the event of a new trial * * * In either case the costs may be made payable out of the estate or fund, as directed by the appellate court," etc. Is there any authority for the Supreme Court to reverse the surrogate in the exercise of his discretion under these statutory provisions? Its authority is confined to matters where the substantial rights of a party are affected; but that is not a substantial right which the party cannot claim *ex debito justitiæ*, or which is dependent upon the favor or discretion of the surrogate.

Opinion of the Court, per GRAY, J.

Is there any authority for the Supreme Court to award, or to direct as to the payment of costs, as it has undertaken to do in this case?

The only authority for an award of costs is in the section quoted from above; but its provisions relate to the costs of the appeal, and they are left likewise to the discretion of that particular court. I think, however, that we may properly hold that the exercise of discretion by the surrogate is somewhat qualified by the words in section 2557 "as justice requires," and that the presence of these words would authorize the interposition of an appellate court, where there had been an abuse of discretion and a violation of justice. Broad as the language of the sections is, I think the legislature should not be deemed to have intended that there should be no redress in cases of an abuse of discretion by the surrogate, and that that view finds support in the words quoted. But where the appellate court undertakes to act in review of that discretion, and to reverse its exercise by the other court, it should and it must appear in the order or judgment that the ground of reversal was the abuse of discretion by the surrogate. In this case the order does not state, in any portion, that the General Term acted upon any such ground. As the surrogate was vested with discretion in the matter, he could commit no error of law with respect to the award, and the General Term, except on the ground stated, is without power to interfere. Judge GROVER, in his opinion in *Marvin v. Marvin* (11 Abb. Pr. [N. S.] 97-101), in referring to the statutory provision then existing, with respect to the surrogate's power to determine the question as to the payment of costs and expenses in probate cases, and as to whether they should be paid by the executor personally or out of the estate, considered that they "vested him with a discretion therein which is not made reviewable by any other court." If such a construction was deemed proper in that case, under the law as it stood, how much more is it demanded in the present case.

In the accounting of Mr. Selleck, as testamentary trustee, some questions arise. Under testator's will he directed that

Opinion of the Court, per GRAY, J.

a house and lot in New York city should be held by his executor, and the net income from the property distributed to and among his children, in equal portions, during the lifetime of a daughter, and that upon her death the trust property should be sold, and the proceeds divided among his children, as provided for the remainder of the estate. The testator died in January, 1870; the will was admitted to probate, and, in May, 1870, letters testamentary issued to the executor. The daughter, during whose life the realty was to be held, died in 1883, and the property thereupon was sold for \$20,200. In his accounts as trustee, Mr. Selleck deducted his commissions, at the rate of five per cent, from the monthly income of the trust property, and upon the sum of \$20,200, the proceeds of the sale, he estimated his commissions at statutory rates. The surrogate allowed him commissions at the statutory rates upon the aggregate amount of the income received from the commencement of the trust, added to the proceeds of the sale; but the General Term reversed him in that respect, and allowed the trustee the commissions as he had estimated them. The counsel for respondent defends his client's right to the commissions, as claimed by him, because, in the first place, the question of the rate was *res adjudicata*; in the next place, that he was entitled to them at that rate as matter of law, and, finally, because the heirs are now estopped to question that rate.

The action of *Selleck v. Decker*, wherein the judgment is relied upon as *res adjudicata* on this head, was brought by Selleck, as executor, against all the children and descendants of testator, to obtain a judicial construction of the will, in respect of the trust property, and of his duties with respect to conflicting claims to the income, made by the immediate children of testator and the representatives of a deceased child. In a statement filed by the executor, showing receipts and disbursements of trust income from February 1, 1878, to March, 1879, appears an item of executor's commissions, which does not state any rate, and which, by mental calculation, is found to be just five per cent upon the amount of rents received within that time.

Opinion of the Court, per GRAY, J.

We do not think the judgment in that action is *res adjudicata* on the question of the trustee's commissions. The rule is well settled, by repeated decisions, that a judgment is conclusive upon the parties, as to questions litigated and decided, whether coming directly in question, or necessarily involved in the controversy; but, in the action referred to, the only question raised by the complaint, and the only issue which was raised by the answer of the representatives of the deceased child (the other defendants not having appeared in the action), was the construction of testator's will as to what parties were entitled to participate as beneficiaries in the trust created therein. The object of the bill filed was to determine that question, and that was and could only be the sole matter of controversy. We think the decision did not prevent any of the parties interested in the trustee's administration of his trust and his accounting, from contesting the accounts by a direct proceeding before the surrogate, in the manner pointed out by statute.

In *Mason's Executors v. Alston* (5 Seld. 28), WILLARD, J., held that the decision of a previous action by James Mason against the executors of his father's will and others interested in that estate, to have the provisions declared inoperative and void and the estate distributed as if testator had died intestate, constituted no bar to the parties to that suit from contesting the validity of the will by a direct proceeding before the surrogate. His reasoning was that there was no issue made upon the point of the *factum* or legal execution of the will, and it could not have been a material issue in that action. That process of reasoning we can adopt here. He says "one of the principles, in relation to an estoppel, is that it must be certain to every intent and not be taken by argument or inference."

As to the trustee's next ground, that he was entitled to the rate claimed as matter of law, he urges that as he was directed by the will to pay over the income, as soon as it was received, the commissions should be deducted from the payments thus made; and as the income came in monthly receipts of rent and was under \$1,000, the rate was five per cent.

Opinion of the Court, per GRAY, J.

We cannot recognize the propriety of such a rule as is here contended for. In *Matter of Mason* (98 N. Y. 527), this court held that in cases where the trustees receive the annual income and render an account thereof, and pay over the balance to the beneficiary each year, there is no occasion for a settlement before the court, and the law does not require the filing of annual accounts. In such a case, upon a final accounting, the trustee may claim and be allowed full commissions on the annual income of the trust estate. He may deduct his compensation from the income annually received before paying it over. The construction in that case was most liberal towards the trustee. We do not think that the fact that the annual income is received in the form of monthly rents, and distributed by the trustee, should be allowed to enlarge the rule of compensation.

Under the circumstances, we are of the opinion that in a case where, upon a final accounting, it appears that the annual income of the trust estate was distributed to the beneficiaries, the trustee may be allowed to claim for full commissions annually. He might have accounted annually to the court and have received his commissions, and the allowance may, upon the final accounting, be made upon the theory of such an annual accounting. While the conduct of this trustee, in respect of his administration, is not such as to very strongly warrant an extension of the benefits of this rule to him, we have, on the whole, decided that it should be done. We see nothing in the claim of his counsel that the heirs are estopped from questioning the rate. The decision below satisfies us on that point.

The account of the trustee, as stated by the surrogate in his decree, should be modified in some particulars of interest charges made against the trustee. After charging him with the gross amount of income received, and with the proceeds of sale of the New York property, he charges him with the sum of \$1,500 received from ten of the heirs towards the payment of the Burkhead mortgage. The referee thought, that as fourteen conveyances were made, covering the entire

Opinion of the Court, per GRAY, J.

parcel of land, the trustee should be charged with the sum of \$2,100 ; but the surrogate modified the report in that respect, and we think the modification was right. The charge of interest upon the sum of \$1,500, we think, was error, as no grounds appear warranting it. We cannot see that the trustee, in fact, withheld the money or appropriated it, and the interest item of \$1,419.92, charged by the surrogate, should be stricken out.

The surrogate's decree taxes the costs and disbursements of the counsel for the trustee on the accounting ; but directs them to be paid by the trustee personally, and not out of the trust fund. That direction seems to us to have been within the discretionary power of the surrogate, and, therefore, for reasons hereinbefore given, was not reviewable by the General Term.

The other questions which have been presented, in the briefs and arguments of counsel, have been considered, but do not call for discussion. We have reached the conclusion that the order of the General Term, so far as it reverses the decree of the surrogate upon the accounting of the executor, should be reversed and that the decree of the surrogate should be affirmed ; and, in so far as it reverses the surrogate's decree upon the accounting of the trustee, it should also be reversed and the matter remitted to the Surrogate's Court, to be there proceeded with in conformity with the decree of the surrogate, as modified by this opinion.

Costs of the appeals in the Supreme Court and in this court are awarded to the appellants, to be paid out of the fund in the trustee's hands.

All concur, except RUGER, Ch. J., and EARL, J., not voting.
Ordered accordingly.

Statement of case.

ELIZA A. MUNOZ, as Administratrix, etc., Respondent, v.
ELIZA A. WILSON, Impleaded, etc., Appellant.

It is only where a bond is shown to have accompanied a mortgage, and it contains the only apparent evidence of the debt to which the mortgage is collateral, that it must be produced, or its non-production accounted for on trial of an action to foreclose the mortgage.

Where, therefore, it appears on the trial of such an action that, although the mortgage recited the giving of a bond, no bond was, in fact, executed, and the existence of and liability for the debt secured is shown by the statements and covenants contained in the mortgage, the non-production of a bond is not fatal to a judgment of foreclosure.

Where there has been an unqualified delivery of a mortgage to a third person for the use of the mortgagee, with intent to make it an operative obligation, and the mortgage is recorded by such third person, although such delivery and record was without the knowledge of the mortgagee; if the rights of creditors, purchasers or incumbrancers have not intervened, it is competent for the mortgagee or his representatives to assent to and ratify the arrangement and to enforce the mortgage.

M., for the purpose of defrauding his creditors, deeded certain real estate to G. without consideration, upon a verbal agreement that the latter should hold the same for the benefit of M., and dispose of the same as he might direct. Subsequently M. procured G. to execute a mortgage on the premises to C., plaintiff's intestate, for the amount of a debt due by M. to her. The mortgage was delivered by G. to M. with authority to deliver it to C., and M. caused it to be recorded. He did not himself deliver it to C., and the latter died a few weeks after the mortgage was so delivered to M. About the time of receiving the deed, G., without consideration, executed and delivered to M. a deed conveying the premises to his wife. M. retained it for about two years after the recording of the mortgage, and then caused it to be recorded. In an action to foreclose the mortgage, *held*, the facts justified a finding of delivery and acceptance of the mortgage; and that the mortgage had a preference over the deed.

M., as a witness for defendants, testified to certain facts, as to which there was no direct contradictory testimony. This testimony was, however, in conflict with legal presumptions arising from acts and admissions of M. and G., which were in evidence, and, in several material respects, other testimony of M. was contradicted by that of disinterested witnesses. *Held*, that the trial court was not bound by the testimony of M., even when contradicted, but was justified in giving credit thereto only so far as it deemed it in harmony with the other facts and circumstances of the case.

(Argued October 12, 1888; decided November 27, 1888.)

111	296
113	61
111	293
119	550
111	295
121	602
111	295
131	183

111	295
164	552

Statement of case.

APPEAL from order of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 14, 1886, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

This action was brought to foreclose a mortgage executed by defendant George Wilson to Elizabeth J. Clay, plaintiff's intestate, the terms of which, as well as the material facts, are stated in the opinion.

The defendant, Eliza A. Wilson, wife of defendant, Michael K. Wilson, alone appealed.

Josiah T. Marean for appellant. One who hands a mortgage to a person, other than the mortgagee, cannot be presumed, without affirmative evidence, to intend a delivery to the mortgagee's use; he must either say something or do something indicating that he intended to part with dominion over it. (*Doe v. Knight*, 5 B. & C. 671.) Upon the undisputed facts in the case no delivery to the mortgagee, either actual or constructive, was ever made. (*Elsey v. Metcalf*, 1 Denio, 323; *Jackson v. Phipps*, 12 Johns. 418; *Rathbun v. Rathbun*, 6 Barb. 98; *Hedge v. Drew*, 12 Pick. 141; *Sheppard's Touchstone*, 58; *Young v. Gilbeau*, 3 Wall. 641; *Day v. Mooney*, 6 T. & C. 382.) If there was no bond, or if no bond was delivered, there was never any mortgage debt, for it is not pretended that George Wilson owed Mrs. Clay otherwise than by virtue of the execution and delivery of the supposed bond, and the judgment is erroneous. (*Bergan v. Urbahn*, 83 N. Y. 49.)

William T. Gilbert for respondent. Michael K. Wilson was not competent as a witness for his wife against plaintiff's objection, being a party to the suit, and the person under whom his wife derived title. (Code, § 829; *Pope v. Allen*, 90 N. Y. 298, 301; *Smith v. Cross*, Id. 549.) The evidence warrants the inference that the mortgage was given to secure Michael K. Wilson's indebtedness to Mrs. Clay.

Statement of case.

(*Smith v. Cole*, 109 N. Y. 436, 439.) The admission of Michael K. Wilson to Kimball was competent, as against George and Eliza A., to prove the debt, Michael K. being at the time the real owner, and the legal title and possession being held for his benefit. (*Chadwick v. Founner*, 69 N. Y. 404, 407.) The act of George Wilson, at Michael's request, in giving the mortgage to Mrs. Clay, to secure his indebtedness to her, was simply a just appropriation of his property to secure or pay his debt. She is, therefore, a purchaser for a valuable consideration. (*Murphy v. Briggs*, 89 N. Y. 446; *Shand v. Handley*, 71 id. 324; *Chautauqua B'k v. Risley*, 19 id. 372.) The acts of Michael and George Wilson constituted a perfect legal delivery. (1 R. S. 738, § 138; 4 Kent. Com. §§ 454-456; Sheppard's Touchstone, 285; *Thompson v. Leach*, 2 Vent. 198; *Read v. Robinson*, 6 W. & S. 331.) George having signed, sealed and delivered the mortgage to Michael, without any condition or qualification, even if he had retained it, such retention, will not *per se*, affect the operation of the deed, for the efficiency of a deed depends upon its being sealed and delivered by the maker of it, not on the ceasing to retain possession of it. (*Scrugham v. Wood*, 15 Wend. 545; *Wallace v. Berdell*, 97 N. Y. 13, 23, 25; *Fisher v. Hull*, 41 id. 416, 422-424; *Doe dem Garnous v. Knight*, 5 B. & C. 671; *Xenos v. Wickham*, 2 H. & L. 296; *Moore v. Giles*, 45 Conn. 570; *Church v. Gilman*, 15 Wend. 656.) The placing of the mortgage on record was a step in the exercise of the authority given by the mortgagor to Michael, and is a conclusive act, showing the intent to make it effectual in behalf of the mortgagee. (*Lawrence v. Farley*, 24 Hun, 293; *Knolls v. Barnhart*, 71 N. Y. 474; *Moore v. Giles*, 49 Conn. 570.) The mortgage in suit is prior and paramount to the deed to Eliza Wilson, because a voluntary or fraudulent conveyance, though prior in time, cannot be set up to defeat a junior mortgage. (*Murphy v. Briggs*, 89 N. Y. 446; *Ledyard v. Butler*, 9 Paige, 132.) A mortgagee is a "purchaser," within the terms of 2 Revised

Opinion of the Court, per RUGER, Ch. J.

Statutes 137, section 5, and of the Recording Act (1 R. S. 756, § 1), which gives priority to the deed first recorded. (89 N. Y. 446.)

RUGER, Ch. J. Michael K. Wilson was, on February 2, 1878, the owner of the lands described in the complaint, and, on some day subsequent thereto, and prior to February fourteenth thereafter, executed and delivered to the defendant, George Wilson, a deed of such property, and the grantee thereupon entered into possession and collected rents derived therefrom.

The case does not show that any consideration was paid for this transfer; but the trial court found, upon sufficient evidence, that the deed was executed and delivered by the grantor without consideration, and with intent to hinder, delay and defraud the creditors of M. K. Wilson; and further found, at defendant's request, that it was "upon a verbal, invalid and not enforceable trust to hold the same for the benefit of M. K. Wilson, and to dispose of the same as he might be directed by said Michael." The latter being indebted to Mrs. Clay in the sum of \$8,500, as found by the trial court, procured George Wilson to execute the mortgage in suit to her on October 2, 1879, and it was duly acknowledged December twenty-seventh, and recorded on December thirty-first of the same year. This mortgage, after execution, was delivered by George to Michael, and was by him caused to be recorded upon the day stated.

The court found that the mortgage was delivered to the plaintiff's intestate, and also found, at defendant's request, that the defendant George Wilson delivered the mortgage "into the hands of said M. K. Wilson with authority to deliver the same to plaintiff's intestate, but never himself delivered the same to the plaintiff's intestate."

It appeared that Mrs. Clay died on February 16, 1880, within a few weeks after the mortgage was received by Michael K. Wilson, and probably before sufficient time and elapsed to enable the register to record and return it to Michael. The court refused to find that no bond was executed

Opinion of the Court, per RUGER, Ch. J.

by George to accompany the mortgage, but it appeared, by the uncontradicted testimony of the mortgagor, that such was the fact. No copy of the mortgage appears in the record, but on the oral argument by the appellant's counsel, in the absence of the respondent's counsel, who submitted the case upon a printed brief, we were furnished by the former with an exemplified copy thereof; and although such copy could not, under well-settled rules, be properly received and used for the purpose of reversing a judgment, the appellant cannot complain if we consider it for the purpose of supplying the defects in the case caused by the neglect of the parties to print it therein. (*Day v. Town of New Lots*, 107 N. Y. 157.) This mortgage recites, among other things, that "the said George Wilson is justly indebted to the said party of the second part in the sum of eight thousand five hundred dollars, lawful money of the United States of America, secured to be paid by a certain bond or obligation bearing even date with these presents, in the penal sum of seventeen thousand dollars, lawful money as aforesaid, conditioned for the payment of the said first-mentioned sum of eight thousand five hundred dollars, on the second day of October, 1881, and the interest thereon to be computed from the day of the date hereof, at and after the rate of six per centum per annum, and to be paid semi-annually therefrom and thereafter, as by the said bond or obligation, and the condition thereof, reference being thereunto had, may more fully appear;" and it was further provided therein that "the said George Wilson, for himself, his heirs, executors and administrators, does covenant and agree to pay unto the said party of the second part, her executors, administrators or assigns, the said sum of money and interest as mentioned above, and expressed in the condition of the said bond." It further appears, by the case, that George Wilson, about the time of receiving the deed from Michael K. Wilson, executed a deed of the same property to Eliza, the wife of Michael K., as grantee therein, and delivered it to Michael, who retained it in his possession until after October 4, 1881, when he caused it to be recorded. The trial court found that this con-

Opinion of the Court, per RUGER, Ch. J.

veyance was also made without consideration and with intent to hinder, delay and defraud the creditors of Michael K. Wilson, and did not become operative as a deed until after the delivery of the mortgage in suit.

Several alleged grounds of error are urged by the appellant as cause for the reversal of the judgment rendered in the courts below in favor of the plaintiff, which, so far as they are material, will be noticed in the course of the opinion. Among other things, it is claimed that the testimony of Michael K. Wilson should have been credited by the trial court, and the facts, so far as they are testified to by him, should be taken as undisputed, and presenting questions of law for the consideration of the court on appeal. The findings of fact by the trial court show that credit was not unconditionally given to such evidence, and we are of the opinion that the court did not err in that respect. Not only was such testimony more or less in conflict with the legal presumptions arising from the acts and admissions of Michael and the defendant George, but it was given after the death of the adverse party in interest, and under the influence of a strong pecuniary interest in the controversy. His testimony was, also, in several material respects contradicted by that of other apparently disinterested witnesses, and subject to the discredit which attaches to a person engaged in a scheme to defraud his creditors. Abundant reason, therefore, existed for the suspicion with which the trial court regarded his evidence, so far as it tended to promote his own interests. Indeed, the mere fact that a witness is the real party to an action, and interested in its result, has been deemed sufficient to require its credibility to be submitted as a question of fact, and more especially so when the testimony is improbable in itself, or inconsistent with other circumstances of the case. (*Honegger v. Wettstein*, 94 N. Y. 252; *Elwood v. W. U. Tel. Co.*, 45 id. 549; *Kavanagh v. Wilson*, 70 id. 177; *Gildersleeve v. Landon*, 73 id. 609.) There is, therefore, no reason in the assault made upon the judgment growing out of any fact testified to by Michael K. Wilson alone. The trial court could, in the exercise of its

Opinion of the Court, per RUGER, Ch. J.

discretion, properly discredit the whole or such portions of his evidence as it disbelieved, and give credit thereto, only so far as it deemed it in harmony with other facts and circumstances of the case.

It is also urged that the non-production of a bond by the plaintiff on the trial is fatal to her right to recover, and we are cited to the case of *Bergen v. Urbahn* (83 N. Y. 49), as authority for this proposition. We think, under the facts above referred to, the case cited is an authority for the plaintiff. The learned judge writing the opinion in that case, referring to and approving the case of *Goodhue v. Berrien* (2 Sandf. Ch. 630), says: "There the mortgage was given to secure sundry liabilities incurred for the mortgagor. This appeared by its terms, and although it also referred to a bond, it was proven that no bond was in fact given. The case now in hand contains neither of these facts." It is only, we think, when a bond is shown to have accompanied a mortgage, and contains the only apparent evidence of the debt to which the mortgage is collateral, that it must be produced, or its non-production accounted for on the trial. The theory upon which this is required, is that the possession of the collateral security alone furnishes no conclusive evidence of the ownership of the debt secured thereby, as it is the mere incident of the bond, and, *non constat*, the bond may have been transferred to another party, who, in that event, would be entitled to the possession of the collateral security. (*Merritt v. Bartholick*, 36 N. Y. 44; *Langdon v. Buel*, 9 Wend. 80.)

The reason of the rule wholly fails when there has never been a bond, or when the existence of and liability for the debt secured is proved, by the admissions and covenants contained in the mortgage. The mortgage in this case expressly admits the existence of an indebtedness by the mortgagor to the mortgagee; and although it also states that it is secured to be paid by a bond, that recital is disproved by the positive testimony of the mortgagor. The mortgage also contains an express covenant to pay to the mortgagee, her executors, administrators or assigns, "the said sum of money and inter-

Opinion of the Court, per RUGER, Ch. J.

est as mentioned above, and expressed in the condition of the said bond." The mortgage further authorized its foreclosure if default shall be made "in the payment of the said sum of money above mentioned or the interest that may grow due thereon."

Each one of these latter clauses refers as well to the sum admitted therein to be owing by the mortgagor to Mrs. Clay as to the sum also stated to be expressed in the bond, and renders the reference to the bond unnecessary and superfluous.

That such a mortgage is a valid security, and authorizes its foreclosure upon default, and a judgment for a deficiency against the mortgagor, is fully sustained by the authorities. (Jones on Mortgages, § 72; *Goodhue v. Berrien*, 2 Sandf. Ch. 630.) We are, therefore, of the opinion that the non-production of the bond was sufficiently accounted for, and afforded no ground for denying the relief sought by the plaintiff.

The appellant, however, insists that the mortgage in question was never delivered to the mortgagee, and, therefore, did not become a valid instrument. It is, undoubtedly, a requisite to the validity of such an instrument that it should not only be delivered, but also accepted. The contention is founded upon the assumption that the evidence of Michael K. Wilson must be taken as uncontradicted evidence, and as establishing affirmatively the fact of non-delivery.

As we have seen, however, the trial court might properly discredit his evidence in that respect, and did so upon this point by finding that the mortgage had been delivered. We think there was sufficient evidence in the case to support this finding. That the mortgage was executed and delivered by George to Michael Wilson, with intent to effectuate a delivery to Mrs. Clay, and thus secure the debt admitted to be due her from the mortgagor, is plainly inferable from the terms of the mortgage, and the acts and conduct of the parties. Certainly no other purpose can be imputed to the mortgagor, for it cannot be assumed that he supposed he was engaged in an idle ceremony intended to have no legal effect. He must be

Opinion of the Court, per RUGER, Ch. J.

assumed to have intended just what his acts and conduct imputed, viz.: to give Mrs. Clay security for an indebtedness owing by him to her, arising out of his assumption of his uncle's debt.

In this transaction Michael K. assumed to represent the mortgagee, and when George delivered the mortgage to him, it was delivered to him as the agent of Mrs. Clay, and with the expectation that he would deliver it to her. So far as George was concerned that delivery was intended to be unconditional and effectual, and to make the instrument an operative security in the hands of Mrs. Clay, beyond his power to recall. (*Verplanck v. Sterry*, 12 Johns. 536.) Michael was simply the messenger through whom the ultimate delivery was to be effected, and as no permission, express or implied, was conferred upon him to retain it, he had no authority to change its terms, or withhold its delivery.

Assuming the validity of the transfer from Michael to George, the acceptance of this mortgage by Michael would have constituted a good payment *pro tanto* of the purchase-price of such land to him by George. (*Murphy v. Briggs*, 89 N. Y. 450.) We think that when there has been an unqualified delivery of a mortgage by a mortgagor, to a third person, with intent thereby to make it an operative obligation, an acceptance thereof by the mortgagee may, under circumstances like those arising in this case, fairly be presumed.

The head-note in *Church v. Gilman* (15 Wend. 656), states the law of that case as follows: "Delivery is essential to the validity of a deed; but the delivery need not be to the grantee in person; it is enough if the deed be delivered to a third person for the use of the grantee. If the delivery to the third person be absolute, the grantor not reserving any future control over the deed, the estate passes; the assent of the grantee to accept the conveyance being presumed, from the fact that the conveyance is beneficial to him." The doctrines of this case were recognized in the case of *Gifford v. Corrigan* (105 N. Y. 223). (See, also, *Elsev v. Metcalf*, 1 Den. 323.) It was said in *Jackson v. Perkins* (2 Wend. 317): "A recorded

Opinion of the Court, per RUGER, Ch. J.

deed may be used as evidence without further proof. * * * Proof of the due execution of a deed, and of its having been recorded, is perhaps *prima facie* evidence of its delivery." But it was further said that this presumption might be rebutted by the grantee.

In *Tompkins v. Wheeler* (16 Pet. 118), it was said, in reference to an assignment for the benefit of creditors: "This deed is absolute upon its face, without any condition whatever attached to it; and being for the benefit of the grantees, the presumption of law is, in the absence of all evidence to the contrary, that the grantees accepted the deed." And it was further said: "It is laid down in Sheppard's Touchstone, page 58, that if a deed be delivered to a stranger for the use of the grantee, without any condition annexed, making it an escrow, it is a delivery to the grantee." (See, also, 5 B. & C. 692.)

The Chancellor said in *The Lady Superior, etc., v. McNamara* (3 Barb. Ch. 378): "A deed may be delivered to a stranger for the grantee named therein without any special authority from the grantee to receive it for him. And if the grantee assents to it afterwards the deed is valid from the time of the original delivery. *Omnis ratihabitio retrotrahitur et mandato sine licentia equiparatur.* (Wing. Max. 485.) It is upon this principle that it has frequently been held that a delivery of a deed to the proper recording officer to be recorded, if intended to vest the title immediately or absolutely in the grantee, either as a trustee or otherwise, is a valid delivery; if not afterwards dissented from by the grantee."

In *Lawrence v. Farley* (24 Hun, 293) it was held, "that in the absence of any evidence to the contrary, the fact that the instrument was found upon the record duly acknowledged or attested was *prima facie* evidence of its delivery."

In *Fisher v. Hall* (41 N. Y. 421), the opinion states that: "It is not necessary that the grantee, or his agent or servant, should be present at the execution in order to have such a delivery of the instrument made as will give it operative vitality and effect. But it is necessary that it should be placed within the power of some other person for the grantee's use,

Opinion of the Court, per RUGER, Ch. J.

or that the grantor shall unequivocally indicate it to be his intention that the instrument shall take effect as a conveyance of the property, in order to have it produce that result."

In *Rathbun v. Rathbun* (6 Barb. 102), the late Judge ALLEN, writing the opinion, said, in a case where the plaintiff had executed a deed to his father, of his own volition and without the knowledge of the latter, and delivered it to the county clerk for record, that "its delivery to the clerk of the county for the use of the defendant, was a perfect delivery by the plaintiff, and upon acceptance by the defendant, the deed took effect from the time of such delivery." (*Jackson v. Bodle*, 20 Johns. 187.) The presumption of delivery arising from the recording of a deed by a grantor is assumed by CHURCH, Ch. J., in *Knolls v. Barnhart* (71 N. Y. 474), and, see *Moore v. Giles* (49 Conn. 570).

As neither the rights of creditors, purchasers or incumbrancers have intervened, we are of the opinion that it was competent for Mrs. Clay, or her representatives, to assent to and ratify the arrangements made for her security, and enforce the mortgage for the benefit of her estate. In *Murphy v. Briggs* (89 N. Y. 452), it was held that a mortgage given by a fraudulent grantee at the request of his grantor, to the creditor to secure the debt of such grantor, if duly recorded, was entitled to preference even over the claims of a subsequent purchaser.

A duly recorded mortgage has preference over a prior unrecorded deed and there is no theory of this case which can give to Mrs. Wilson's deed any effect as against the claim arising under the mortgage in suit. (*Murphy v. Briggs*, *supra*.)

It follows that the judgment should be affirmed

All concur.

Judgment affirmed.

SICKELS — VOL. LXVI. 39

Statement of case.

LOUISE M. KERNOCHAN, as Administratrix, etc., Appellant, v.
ANGELINE A. MURRAY et al., Executors, etc., Respondents.

111	306
128	52
111	306
165	419

It is a presumption of law, in the absence of express words, that the parties to a contract intend to bind not only themselves, but their personal representatives.

Upon the sale by De M. & Co. to K., plaintiff's testator, of certain shares of corporate stock, as an inducement thereto, said firm executed to K. a writing guaranteeing that, so long as he held the stock, he should receive dividends thereon equal to seven per cent per annum, and agreeing that they would make good any deficiency. *Held*, that this writing was an original contract, and, although in the sale of the stock they were, in fact, acting as agents for an undisclosed principal, in making it they were principals, not sureties; that the guaranty was not limited to the duration of the partnership or the lives of the copartners; and that, therefore, an action was maintainable upon the guaranty, against the executrix of the surviving member of said firm, for deficits accruing after the death of such survivor.

(Argued October 12, 1888; decided November 27, 1888.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made January 13, 1887, which affirmed a judgment in favor of defendant, entered upon a verdict.

This action was brought originally by John A. Kernochan, the present plaintiff's intestate, against defendants, as executors of the will of Richard M. De Mill, who, at the time of his decease, was the sole surviving member of the firm of De Mill & Co.

In 1871 said firm sold to Kernochan forty shares of the stock of a corporation known as the Albemarle Swamp Land Company. At the time of the purchase, and, as an inducement thereto, the firm executed and delivered to Kernochan an instrument, of which the following is a copy:

"In consideration of your having purchased, upon my representation as to their value, forty shares of stock of the Albemarle Swamp Land Company, and of one dollar to me in hand paid, I do hereby guaranty that you shall receive, as long as

Statement of case.

you hold said stock, dividends equal to seven per cent per annum, or I will make good to you all deficit from such amount.

"NEW YORK, August 21, 1871.

"DE MILL & CO.

"Witness: JOHN S. LENG."

The company failed to pay dividends, and Kernochan collected, under the guaranty, the amount guaranteed up to the death of defendant's testator. This action was brought to recover deficits accruing thereafter.

J. Frederic Kernochan for appellant. It is a presumption of law that parties to a simple contract intend to bind not only themselves, but their personal representatives. (2 Parsons on Con. [6th ed.] 530; *Stillman v. Northrup*, 109 N. Y. 473.) The contract sued upon is not a contract of guaranty, but an original and independent one. (*Jamison v. Citizens' Savings Bk.*, 44 Hun, 412; *Cobb v. Knapp*, 71 N. Y. 348.) Even if the agreement be construed to be a contract of guaranty, defendant having received consideration, is not a mere naked surety, and his estate is not discharged. (*Richardson v. Draper*, 87 N. Y. 344.)

Sidney V. Lowell for respondents. The fact that the De Mills were agents only for the sale of the stock is a material fact. The surety paper looked to purely personal relations between the parties. It contained no words binding the successors or administrators, etc., of the signers, and from its general language and the context was evidently not meant to extend beyond the lines of the parties. (*Royal L. Ins. Co. v. Davies*, 40 Iowa, 469; *Dickinson v. Callahan*, 7 Harris [Pa.], 227; *Quain's Appeal*, 10 id. 510; *Bland's Admr. v. Ulmstead*, 11 id. 316; *Tasker v. Shepherd*, 6 H. & N. 575; *Campanari v. Woodburn*, 80 C. L. [Eng. Rep.] 400.) A claim ceases at the death of a party whose liability is that of a surety only. (*Risley v. Brown*, 67 N. Y. 160; *Hauck v. Craighead*, Id. 432; *Wood v. Fisk*, 63 id. 245; *Getty v. Binsse*, 49 id. 385.) Even where the death of the surety occurs after judgment against

Opinion of the Court, per ANDREWS, J.

him, the obligor has no right to collect the judgment. (*Risely v. Brown*, 41 N. Y. 160.)

ANDREWS, J. We think the judgment below proceeds upon a misconstruction of the contract of guaranty. The guaranty did not, in terms, purport to bind the executors or administrators of De Mill & Co. But it is a presumption of law, in the absence of express words, that the parties to a contract intend to bind not only themselves, but their personal representatives. (1 Pars. on Con. 530, and cases cited; Co. on Lit. 209 a.) In case of a contract for the payment of money, or the sale or purchase of property, or of a covenant of warranty, it would be an unreasonable supposition that the parties intended that the obligation should not survive against their representatives, although not specially named. It is, of course, competent for parties to agree that a contract shall not survive and that all obligation under it should terminate on their death. So a contract may be of such a nature as to admit only of a personal performance, or as to imply that it is to be operative only during the continuance of personal relations, although not so expressed in terms, and will be deemed dissolved by death or other disability which renders performance, according to the intention, impossible. Contracts for the rendition of personal or professional services are of this character, and they terminate with the death or disability of the party owing them.

The guaranty in this case has no such personal quality. It was given by De Mill & Co. as an inducement to the plaintiff's testator to purchase from them forty shares of the stock of "The Albemarle Swamp Land Company." They represented the stock to be valuable, and claimed to be selling it for some parties who held it, and who desired to realize upon it, but whose names were not disclosed. They guaranteed that the plaintiff, so long as he held the stock, should receive dividends thereon equal to seven per cent per annum, and that they would make good any deficiency. The contract is plain and unambiguous. The obligation of De Mill & Co. was not limited in terms to the duration of the partnership or to the

Opinion of the Court, per ANDREWS, J.

lives of the copartners. The only limitation of time was the period during which the purchaser should hold the stock. The guaranty protected the purchaser while his interest should continue, and this presumably was what he required and both parties intended. Any other construction would subject the purchaser to the risk of losing the benefit of the guaranty on the death of the guarantors, which might happen at any time. There are cases cited holding that a continuing guaranty of advances to be made to a third party, in the absence of any express provision, is revoked as to subsequent advances by the death of the guarantor and notice. (*Coulthart v. Clementson*, L. R., 5 Q. B. D. 42; *Harriss v. Favocett*, L. R., 15 Eq. Cas. 311.) These cases stand upon a perfectly equitable principle, each advance constituting a fresh consideration. But a guaranty creating a continuing pecuniary obligation, the consideration for which is entire and given once for all, is very different, and it would be very inequitable to hold that it was terminated by the death of the guarantor, unless this intention is plainly expressed in the guaranty itself. (*Lloyd's v. Harper*, L. R., 16 Ch. Div. 290.)

The judgment in this case cannot, therefore, we think be supported on the theory that the guaranty, by fair intendment, was limited to the lives of the guarantors. Equally unfounded, we think, is the claim of the defendants that De Mill & Co. were sureties, and for that reason their obligation terminated on their death. (*Getty v. Binsse*, 49 N. Y. 385.) Their undertaking was original and not collateral. They entered into the guaranty for their own benefit, upon a consideration moving to them as principals. If they were in fact, acting as agents in selling this stock, not having disclosed their principal, they stood in respect to the purchaser as the owner and vendor. (*Cobb v. Knapp*, 71 N. Y. 348.) In entering into the guaranty they assumed no obligation resting on the company. The company was under no legal obligation to declare dividends to stockholders, and, least of all, to declare dividends of any particular amount. The contract of De Mill & Co. was clearly original, and they were principals and not sureties.

Statement of case.

We think the judgment should be reversed and a new trial granted.

All concur.

Judgment reversed.

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THE PEOPLE ex rel. THE UNION INSURANCE COMPANY OF PHILADELPHIA et al., Appellants, v. STEPHEN P. NASH et al., Respondents.

Both at common law and under the Code of Civil Procedure (§ 2383), a submission to arbitration may be revoked by any party thereto at any time before the matter has been finally submitted to the arbitrators for their decision; and this is so although the agreement to arbitrate provides against any revocation, and, by its terms, the party seeking to revoke, for a valuable and executed consideration, expressly waived, and abandoned the right to revoke. Such stipulations, like other executory agreements if broken, simply leave the other party to seek redress by action for damages.

The arbitrators derive their power to act simply from the continuing consent of the parties, and when the agreement, while yet executory, is broken by the refusal of a party to be bound by or to perform it, the power of the arbitrators cease.

As to whether the court has power by *mandamus* to compel the performance by arbitrators of their functions, *quære*.

(Argued October 16, 1888; decided November 27, 1888.)

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, made March 28, 1888, which affirmed an order of Special Term, denying an application of the relators for a peremptory *mandamus* requiring defendants, as arbitrators appointed under an arbitration agreement between the petitioner and Lorenzo Dimick, to proceed with the arbitration. (Reported below, 47 Hun, 542.)

The submission was of certain matters in controversy included in actions then pending between the parties, "and all other manner of actions, cause or causes of action, suits, controversies, claims and demands whatsoever now pending, existing or held by and between the said parties."

Statement of case.

The agreement contained this clause: "And it is hereby further agreed by and between the said parties, in consideration of the agreements and covenants herein contained, to be kept and performed by the respective parties hereto, that neither of the parties hereto shall have the right to revoke the submission to arbitrators herein provided for, or this agreement, or any part thereof, and such arbitration shall not terminate or be revoked by the dissolution or death of either or any of the parties hereto, but in case of such dissolution or death of either or any of the parties hereto, during the pendency of such arbitration, the same shall continue against the personal representatives of such deceased person, or against the successor or person, or officer charged with the duty of administering the assets of such corporation, and any revocation by operation of law, and any and all right of revocation given or permitted by statute or otherwise, is hereby expressly waived and abandoned."

Before the matters were finally submitted to the arbitrators, Dimick served upon the arbitrators a written notice of revocation, and thereafter they declined to act.

Treadwell Cleveland and *Norris Morey* for appellants. The attempted revocation by Dimick has no efficacy in determining the authority of the arbitrators to proceed, or in invalidating the award which they may make. (Morse on Arbitration and Award, 230, 231.) Where parties have entered into an agreement to arbitrate, based upon a valuable and executed consideration, and have, on the strength of such consideration, bound themselves either in terms or by necessary implication not to revoke such submission, they will be concluded by such agreement, and will not be permitted to revoke without adequate cause. (*Bk. of Monroe v. Widner*, 11 Paige, 529; *Hunt v. Rousmanier*, 8 Wheat. 174, 201; *McGeen v. Druffield*, 5 Penn. St. 497; *Johnson v. Andrews*, 5 Phil. 8; *Paist v. Caldwell*, 75 Penn. St. 161; *Shisler v. Keavey*, id. 79; *Lewis Appeal*, 91 id. 361; *Williams v. Tracy*, 95 id. 308.) Whatever rights of revocation may be deemed to exist either at common

Statement of case.

law or under the statutes, all such rights have, in the present case, been wholly and effectually waived by the express terms of the arbitration agreement, as above quoted. (*In re N. Y., L. & W. R. R. Co.*, 98 N. Y. 453; *Cutter v. Cutter*, 48 N. Y. Supr. Ct. 470; *Lee v. Tillotson*, 24 Wend. 357; *Cranford v. Lockwood*, 9 How. Pr. 548; *Root v. Wagner*, 30 N. Y. 9; *Ripley v. Aetna Ins. Co.*, Id. 163; *Townsend v. Masterson, etc., Co.*, 15 id. 587; *People v. Stephens*, 52 id. 306.) Whatever right of revocation Dimick may be deemed to have possessed he was estopped from exercising it, by reason of his solemn representation in the arbitration agreement to the effect that he had no such right. (Herman on Estoppel, §§ 211, 320, 323, 328, 331, 445, 468, 469; Bigelow on Estoppel, 479, 541, 578; *In re Cooper*, 93 N. Y. 507.) Whatever right of revocation Dimick may heretofore have had, such right was, under the provisions of the Penal Code, wholly suspended prior to his attempted revocation, by reason of his sentence to imprisonment for grand larceny in a state prison for a term of years. (Penal Code, § 707; 2 R. S. 701, § 19; *Bowles v. Haberman*, 95 N. Y. 246; *Werckman v. Werckman*, 4 N. Y. Civ. Pro. Rep. 146; *Bonnell v. R. W. & O. R. R. Co.*, 12 Hun, 218; *Davis v. Duffie*, 4 Abb. Pr. [N. S.] 478.) The writ of *mandamus* hereby applied for is a suitable and proper relief in the present case. (Wood on Mandamus, 19, 54; Hawes on Jurisdiction of Courts, § 141; *Ex parte Parker*, 120 U. S. 743; *Life and Fire Insurance Co. v. Wilson's Heirs*, 8 Pet. 302; *Carpenter v. County Commissioners, etc.*, 21 Pick. 258; *People v. Steele*, 2 Barb. 417; *Carey v. Comrs., etc.*, 19 Ohio, 245; 2 R. S. 540; *Fudickar v. Guar. Mut. L. Ins. Co.*, 62 N. Y. 399; *Rex v. Goodrich*, 3 Smith, 388; *In re Brighton Sewers Act*, L. R., 9 Q. B. D. 723; *King v. Mayor, etc.*, 1 M. & S. 697; *S. C.*, 1 D. & R. 148; Wilson on Jur. of Cts. §§ 476, 477, 483; *People v. Supervisors*, 24 How. Pr. 119; *Rex v. Stewart*, 2 D. & R. 176; *Queen v. Goodrich*, 19 L. J. Rep. [Q. B.] 413; *Hightower v. Overhaulser*, 65 Iowa, 347; *People v. Becker*, 3 N. Y. St. Rep. 202; *People v. Chapin*, 105 N. Y. 309.) The order of the General Term

Statement of case.

herein is appealable to this court. (*People ex rel. Gas Light Co. v. Common Council*, 78 N. Y. 56; *People ex rel. Millard v. Chapin*, 104 id. 96.) Whenever a legal right exists, the party is entitled to a legal remedy, and, when all others fail, the aid of a *mandamus* may be invoked. (*People v. N. Y.*, 10 Wend. 395, 398; *People v. Schielling*, 95 N. Y. 133; *People v. Steele*, 2 Barb. 397, 416-419; Tapping on *Mandamus*, 5, 30, 173; Hawes on Jur. of Cts. § 141; *Rex v. Barker*, 3 Burrows, 1265; High on Extra. Rem. §§ 1, 159, 215; Wood on *Mandamus*, 111.) The submission to arbitration in question is clearly a statutory submission under title 8 of chapter 17 of the Code of Civil Procedure. (Code, §§ 2367, 2386; *In re Martin*, 1 How. Pr. [N. S.] 28.) Parties may agree that a pending action shall not abate by the death of one of the parties thereto, and this has been held valid, although the statute provided to the contrary. (*Cox v. R. R. Co.*, 63 N. Y. 414.) The right of appeal given by the Code may be waived by the agreement of the parties. (*Townsend v. M. S. D. Co.*, 15 N. Y. 587.) An arbitrator is a judge selected by the parties; he is, by their consent, invested with judicial functions in the particular case; he is to determine the right as between the parties in respect to the matters submitted, and all questions of fact or law upon which the right depends are under a general submission, deemed to be referred to him for decision. (*Fudickar v. Ins. Co.*, 62 N. Y. 392-399; *Story v. Elliott*, 8 Cow. 28, 31; Code of Civ. Pro. §§ 854, 2365, 2386; *Howard v. Saxton*, 1 Denio, 440; *Brown v. Lyddy*, 11 Hun, 451-456.) Everyone who is appointed to discharge a public duty and receives compensation in whatever shape, whether from the state or otherwise, is a public officer. (*Henly v. Mayor, etc.*, 5 Bing. —; *In re Wood*, 2 Cow. 29; *People v. Nostrand*, 46 N. Y. 381.) The writ of *mandamus* is the appropriate remedy to compel the performance by arbitrators of their duties. (Wood on *Mandamus*, 110; Tapping on *Mandamus*, 92; *Clark v. Elwick*, 1 Strange, 1; Barnes, 58, title, Award.)

Statement of case.

S. P. Nash and James E. Carpenter for respondents. A *mandamus* will not lie against parties acting under a private mandate, as distinguished from one conferred by law. (*People ex rel. Cooper v. Trustees*, 21 Hun, 184, 195.)

William Allen Butler for respondents. *Mandamus* is the appropriate remedy where a public duty is imposed or some act specifically directed by statute, but it will not lie to enforce a private contract. (*Ex parte Robbins*, 7 Dowl. P. Cases, 566; *People ex rel. Coopers v. Trustees*, 21 Hun, 184; *Stackpole v. Seymour*, 127 Mass. 104; *Pond v. Harris*, 113 id. 114; *Miller v. Canal Co.*, 53 Barb. 590.) The judge, at Special Term, correctly held that Dimick had the right to revoke the submission, and that his revocation being in the manner required by section 2383 of the Code of Civil Procedure, was effectual to terminate the arbitration. (*Tobey v. Bristol*, 3 Story, 800; *Morse on Abr.*, 230; *Curtis v. Barnes*, 30 Barb. 225; *Bank of Monroe v. Widner*, 11 Paige, 529; *Allen v. Watson*, 16 Johns. 205; *Marsh v. Packer*, 20 Vt. 198; 6 Bing. 443; 15 Wend. 99; 7 Abb. Pr. [N. S.] 251; 27 Geo. 368; 5 Phil. 8; 12 id. 383.) Such a submission could not be made irrevocable by any agreement of the parties. (*Morse on Abr.* 230; *Tobey v. Bristol Co.*, 3 Story, 800; *Marsh v. Bulteel*, 5 B. & Ald. 508; *In re Rouse*, L. R., 6 C. P. 212; *Vynior's Case*, 4 Coke Rep. 299; *Froyer v. Ehrensperger*, L. R. 12 Q. B. Div. 310; *Thompson v. Anderson*, L. R., 9 Eq. 523; Code of Civil Pro. § 2383.) Agreement that arbitrators may proceed *ex parte* if other party neglects to appear does not render submission irrevocable. (*B. & I. R. R. Co. v. Nashua Co.*, 139 Mass. 463; *Jones v. Harris*, 59 Miss. 214; *McGheehan v. Duffield*, 5 Penn. St. 497.) By revocation the other party is left solely to the penalty of the bond or his remedy on the case. (*Pond v. Harris*, 113 Mass. 114; *Miller v. Canal Co.*, 53 Barb. 590.) The claim made by the relators that Dimick could not revoke his submission because he was under the disability imposed by section 707 of the Penal Code is untenable. (107 N. Y. 13.)

Opinion of the Court, per GRAY, J.

GRAY, J. The position taken by the appellants, with respect to the agreement of arbitration in question here, is that the character of revocability, inherent in such submissions, is affected by that article of the agreement, which provides against any revocation and expressly waives and abandons the right to revoke. They do not dispute the common-law rule that submissions to arbitration are revocable in their nature, and, indeed, that such was the rule is too well established and recognized by early and late English cases, and by the New York statutes and decisions to admit of dispute. (*Allen v. Watson*, 16 Johns. 205; *Bank v. Widner*, 11 Paige, 529; 2 R. S. 544, § 23; *Tobey v. County of Bristol*, 3 Story, 800; *Vynior's Case*, 8 Coke, 81 b. [4th vol. of Frazer's ed. 302]; *Marsh v. Bulteel*, 5 B. & Ald. 508; *Re Rouse v. Meier*, L. R., 6 C. P. 212; *Fraser v. Ehrensperger*, L. R., 12 Q. B. D. 310.) Whatever may have been decided elsewhere in this country, we are satisfied that that is the better rule of law which has been recognized in England and in this state, and which considers a submission revocable, until its nature is changed by legal enactment, as was done by English statutes. As it was said in *Vynior's Case* (*supra*), "man cannot by his act make such authority, power or warrant not countermandable, which is by the law or its own nature countermandable;" he cannot "make that irrevocable which is of its own nature revocable."

But the learned counsel for the appellants say the facts underlying this submission, in the discontinuance of suits, the abandonment of advantages and the peculiar and unusual agreements contained in this submission, by which the right to revoke is waived and abandoned, take it out of the common law, or statute rule. They say that here was an express waiver of the right to revoke, based on a valuable and executed consideration, and they argue that failing the reason of the rule, the rule itself fails.

No unusual character is imparted to the agreement by its being based on such a consideration. All such agreements must be based on a good consideration, and if the discontinuance of the pending suits and the loss of advantages

Opinion of the Court, per GRAY, J.

thereby occasioned, are the features which constitute the executed consideration, they are but the incidents of the agreement of submission. That was the decision of this court in *McNulty v. Solley* (95 N. Y. 242), where DANFORTH, J., collects authorities to sustain the proposition that by submission to arbitration, *eo acto*, the discontinuance of the pending litigation is effected. The flaw in the argument of appellants' counsel is in its assumption that the character of the mandate to the individuals, selected to determine the controversy between parties, can be changed by their private agreements, or affected by the circumstances which were its producing cause, or which the execution of the agreement induced.

The source of the mandate or power, by virtue of which the arbitrators act, is in the private agreement which the parties have entered into, for reasons satisfactory to themselves, in order to have an end to dispute and to legal strife, and the force of the mandate to them is in the consent of the parties that they shall act. But in the execution of the power, or in the thing they are to accomplish, the arbitrators have no interest, and thus the case is altogether different from one where the mandatory has an interest in the execution of the power and in the result of its exercise. In such a case the mandate, which goes forth with the execution and delivery of the agreement to the mandatory, becomes irrevocable. We are at a loss to understand how the nature of the agreement between the parties, or any resulting incident of that agreement, add anything to the power of the arbitrators. The agreement of submission is executory, until the controversy is completely ended between the parties by the submission to the arbitrators of the controversial facts for their decision; and not till then can it be said that the agreement has been executed and has passed beyond the power of the parties to withdraw from or to break. Until that ultimate stage has been reached, every article of the agreement, which relates to the future conduct of the parties, lies in the region of promise, and that promises can be and are broken, regardless of their weight or the consequences, is as proverbial as it is certain.

Opinion of the Court, per GRAY, J.

The express agreement not to revoke is executory, of course, like every other agreement to do or not to do a certain thing. Although the parties agreed not to revoke, the fact is that one of them has done so, notwithstanding his agreement, and the other is left to such legal remedies as may offer themselves, to protect or compensate him for the breach. The agreement to waive any right to revoke does not help the situation. A waiver, to be effectual and beyond recall, must be of some present existing right, conferred by statute or otherwise. When the agreement to waive relates to the future conduct of the party, it is merely executory and amounts to nothing more than the agreement not to revoke. The difficulty is that as the arbitrators have no interest in the result of the arbitration and derive their power to act from the continuing consent of the parties to the agreement, when the agreement, while yet executory, is broken by the refusal of a party to be bound by it or to perform it, the foundation of the arbitrator's power is gone and they have no more authority over the withdrawing party to bind him by their acts.

The legislature of this state in enacting section 2383 of the Code of Civil Procedure have set at rest any existing conflict in the decisions and have enlarged the rule as recognized in the previous statutory enactment (2 R. S. 544 § 23.) By its provisions a submission to arbitration, whether made as prescribed in that title or otherwise, may be revoked at any time before the closing of the proofs and the final submission of the cause for decision. The revocation must be in writing, signed by the parties and delivered to the arbitrators, and it is competent for one of several parties on a side to effect such a revocation. We perceive no reason for qualifying the force of this section in the way suggested by appellants' counsel, who say that it is only available to a party when revocation is allowable, and as, by express agreements in this submission, the right of revocation was stipulated away; the provisions of the section are inapplicable. We think the language of this section is broad enough to cover all cases of submission, and that the only restriction is as to the time and the mode of the act of revoca-

Statement of case.

tion. And as to the agreement not to revoke, as we have suggested, like any other agreement relating to the future conduct of parties, it was executory, and, if broken, left the other party helpless thereunder, and under the necessity to seek redress for the breach elsewhere.

We have preferred to express our views upon the main conflict as to this submission, in view of its importance, and, while doubting the power of the court to compel by writ of *mandamus* the performance by these arbitrators of their functions, we do not now express any opinion upon that question.

For the reasons expressed, we think the order of the General Term, affirming the order of the Special Term denying a motion for a peremptory *mandamus*, should be affirmed, with costs.

All concur.

Order affirmed.

JANE LINTON MORRIS as Administratrix, etc., Respondent, v.
WALSTON H. BROWN et al., Appellants.

Defendants were engaged, under a contract with the aqueduct commissioners of the city of New York, in excavating for a tunnel. By their contract they were bound to furnish "all facilities for the purpose of inspection." M., defendant's intestate, was a civil engineer in the employ of the commissioners. It was his duty to inspect the work to see that it was done in compliance with the contract. For the purpose of removing the material excavated defendants employed "dump cars" running on a track laid in the shaft. The cars were drawn out by a cable and returned by gravitation, their downward speed being regulated by a brake. They were not intended as facilities for taking persons down the shaft, or fitted for that purpose. M., who was riding on the outside of one of these cars down the shaft, to where the work of excavation was going on, through the neglect of the brakeman in charge of the car to control its velocity, was thrown from the car and killed. In an action to recover damages, it appeared that there was plenty of room in the shaft to go on foot up and down it, and there was no obstruction in the way of the engineer's proceeding to the work on foot; that while M. had been accustomed, with the consent of the brakeman, to so ride down, it did not appear that this was with the knowledge of the defendants, or that the brakeman had any authority to give his consent. It also appeared

Statement of case.

that other engineers employed in the work of inspection usually, although not always, walked up and down the shaft. *Held*, that no duty or obligation rested upon defendants to transport M. into the tunnel or to allow such a use of their car by him, or to manage it with such care as to prevent injury to him when riding thereon; that no license could be implied by such former use of the cars; that the decedent took upon himself the risk, both as to the condition of the cars and the quality and care of the brakeman; and that, therefore, a refusal to nonsuit was error.

It seems that if the decedent in going in or coming out of the tunnel, or while engaged in the duty of inspection had been run over by the car, either because of its imperfection or the careless management of defendants' servant having it in charge, a different question would have been presented.

Byrne v. N. Y. C. & H. R. R. R. Co. (104 N. Y. 362); *Weinhold v. Acker* (17 J. & S. 183); *Wendell v. Baxter* (12 Gray, 494); *Ackert v. Lansing* (59 N. Y. 646); *Beck v. Carter* (68 id. 283) distinguished.

A master is chargeable with the conduct of his servant only when the latter is acting in the execution of the authority given him and in the performance of his duties.

(Argued October 15, 1888; decided November 27, 1888.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 14, 1886, which affirmed a judgment in favor of plaintiff, entered upon a verdict, and affirmed an order denying a motion for a new trial.

This action was brought by plaintiff as administratrix of the estate of Robert E. Morris, to recover damages for alleged negligence, causing the death of her intestate.

The material facts are stated in the opinion.

Edward T. Lovett for appellants. The plaintiff's intestate assumed the risk of riding on these cars, as they were not constructed for or intended by defendants to be used as passenger cars. (*Deforest v. Jewett*, 88 N. Y. 269; *Gibson v. E. R. Co.*, 63 id. 449; *Laning v. N. Y. C. R. R. Co.*, 49 id. 521.) The greatest negligence on the part of the defendants will not cure the defect of the least negligence contributing to the injury on the plaintiff's part. (*Field v. H. R. R. R. Co.*, 24 N. Y. 430; *Cordell v. N. Y. C. & H. R. R. R. Co.*, 75

Statement of case.

id. 332; *Reynolds v. N. Y. C. & H. R. R. Co.*, 58 id. 248; *Becht v. Corbin*, 99 id. 658; *Hart v. Hudson River Bridge Co.*, 84 id. 57; *Gregor v. N. Y. C. R. R. Co.*, 40 id. 34; *Sammon v. N. Y. & H. R. R. Co.*, 62 id. 250; *Clark v. Eighth Ave. R. R. Co.*, 36 id. 136; *Searles v. M. R. Co.*, 101, id. 662; *Burrows v. Erie R. Co.*, 63 id. 556; *Morrison v. E. R. Co.* 56 id. 302; *Phillips v. R. & S. R. R. Co.*, 49 id. 177; *Kreasanowski v. N. P. R. R. Co.*, 18 Fed. R. 229; *R. R. Co. v. Jones*, 95 U. S. 439.) It is no excuse for the deceased to say that he was on this car with the consent of the defendants. (*Burrows v. E. R. Co.*, 63 N. Y. 556.) It is not sufficient that the plaintiff should prove facts from which either the conclusions of negligence or the absence of negligence may with equal fairness be drawn, but the burden is upon the plaintiff to prove that there was no contributory negligence on his part. (*Hart v. Hudson River Bridge Co.*, 84 N. Y. 56; *Tolman v. S. B. & N. Y. R. R. Co.*, 98 id. 198; *Lee v. Troy Citizens' Gas Light Co.*, Id. 116; *Bernstein v. Rose*, 10 Daly, 338.) There is no presumption that the plaintiff is free from negligence; some evidence of the exercise of due care is required. (*Wilds v. H. R. R. R. Co.*, 24 N. Y. 430; *Warner v. N. Y. C. & H. R. R. R. Co.*, 44 id. 471; *Reynolds v. N. Y. C. & H. R. R. R. Co.*, 58 id. 250; *Hale v. Smith*, 78 id. 483; *Desmond v. Rose*, 40 J. & S. 569; *Cordell v. N. Y. C. & H. R. R. R. Co.*, 75 N. Y. 330; *Hart v. Hudson River Bridge Co.*, 84 id. 56; *Riceman v. Havemeyer*, 85 id. 647; *Becht v. Corbin*, 82 id. 658.)

C. A. Kellogg for respondent. The defendants were negligent in allowing the cars to descend into the tunnel without attaching the cable or attempting to control their speed in anywise, while human beings were upon them whose lives would be endangered. (*Radley v. L. & N. W. R. R. Co.*, L. R., 1 App. Cas. 754, 759; *Kenyon v. N. Y. C. R. R. Co.*, 5 Hun, 479; *Green v. E. R. Co.*, 11 id. 333, 334.) The evidence to warrant a nonsuit on the ground of defendants' negligence must appear so clear that no construction of the evidence or inference drawn

Statement of case.

from the facts will warrant a contrary conclusion. (*Stackus v. N. Y. C. R. R. Co.*, 79 N. Y. 465.) When the evidence is undisputed, where the facts are such that different conclusions might be drawn by different minds from them, the court cannot say, as matter of law, that the party has or has not been guilty of contributory negligence, but must submit the question to the jury. (*Hart v. Hudson R. Bridge Co.*, 80 N. Y. 622.) Plaintiff's intestate was rightfully on the premises under the contract, the car being one of the facilities for entering the tunnel, and, under an implied license from the former use of the cars, that he might rightfully ride upon them. (*Byrne v. N. Y. C. R. R. Co.*, 104 N. Y. 365; *Sutton v. N. Y. C. R. R. Co.*, 1 Duer, 580; *Coughtry v. Globe Woolen Co.*, 56 N. Y. 124; *Swords v. Edgar*, 59 id. 28; *Ackert v. Lansing*, Id. 646; *Beck v. Carter*, 68 id. 292; *Congdon v. Delaware & Hudson Canal Co.*, 15 Week. Dig. 24; *Weinhold v. Acker*, 49 J. & S. 182; 99 N. Y. 671.) As plaintiff's intestate was aware that it was the duty of the man in charge of the cars, to attach the cable before starting the cars, and his invariable custom to do so, he had a right to rely upon the fact that this duty would be performed. (*Newson v. N. Y. C. R. R. Co.*, 29 N. Y. 383; *Roll v. N. Y. C. R. R. Co.*, 7 Week. Dig. 497; *Gray v. Grand Trunk R. R. Co.*, 8 id. 371; *Sutton v. N. Y. C. R. R. Co.*, 66 N. Y. 243-248.) As the collision was produced solely by the gross neglect of defendants' agent, the position of plaintiff's intestate on the car did not contribute to it in the remotest degree. (*Carroll v. N. Y. & N. H. R. R. Co.*, 1 Duer, 578.) There may be a recovery even where the plaintiff was negligent, if such negligence was not the proximate cause of the injury. (Sherman and Redf. on Neg. §§ 25, 28 and note; *Button v. H. R. R. R. Co.*, 13 N. Y. 248, 258; *Haley v. Earle*, 30 id. 209; *Austin v. N. Y. Steamboat Co.*, 43 id. 75; *Kenyon v. N. Y. C. R. R. Co.*, 5 Hun, 479; *Green v. E. R. Co.*, 11 id. 333, 334; *Reemer v. L. I. R. R. Co.*, 36 id. 254; *Stringham v. Stewart*, 100 id. 516; *Hawley v. N. C. R. R.*

Opinion of the Court, per DANFORTH, J.

Co., 82 id. 370.) Evidence in reference to the habit of riding into the tunnel on the cars was proper to show a license on the part of the defendants to allow the engineers to ride upon the cars. (*Congdon v. D. & H. C. Co.*, 15 Week. Dig. 24; *Weinhold v. Acker*, 49 J. & S. 182; 99 N. Y. 671.)

DANFORTH, J. The defendants, under a contract with the aqueduct commissioners of the city of New York, were engaged at Croton Dam in the construction of a tunnel by excavation. The decedent was a civil engineer in the employ of the commissioners, and it was his duty to inspect for them the work of the defendants, "to see that it was done in compliance with their contract," and the defendants bound themselves to furnish "all facilities for the purpose of inspection." The shaft had been opened about three hundred and fifty feet on a descending grade, and the defendants had a track laid therein, over which, by the aid of a stationary engine and a cable attached thereto, and to open boxes or dump cars, they drew out stone and other material broken off by blasting. The cars returned by gravitation at a speed intended to be regulated in part by a brake applied to a drum over which the cable ran. On the 24th of September, 1885, the decedent got upon the outside of one of these cars, and before reaching the end of the excavation, was, through the omission of defendant's servant to attach the cable to the car, or otherwise control its velocity, thrown off and killed. At the close of the case defendant's counsel asked for a dismissal of the complaint, upon the ground, among others, that the plaintiff had failed to show any duty or obligation on the part of the defendants to so manage the cars that they should be in safe condition and run with care to prevent injury to the intestate. The request was refused and the case submitted to the jury by the learned trial judge, as one where for negligence on the part of the defendant, and freedom from negligence on the part of the intestate, the plaintiff might recover. The plaintiff had a verdict. The important question upon this appeal is raised by the exception taken to the refusal of the trial judge to dismiss the complaint.

Opinion of the Court, per DANFORTH, J.

At the request of the defendants the trial court charged the jury that "it is a matter of uncontradicted evidence that these cars were placed in this tunnel for the purpose of hauling out the debris, and not for the purpose of transporting passengers," and, also, "in the absence of a duty on the part of the defendants to transport the deceased in and out of the tunnel, he was a trespasser on the car." As thus presented, the question of contributory negligence becomes unimportant, but if it were otherwise, and that question fairly in the case, I should have no hesitation in saying that, under the evidence as to the circumstances and the conduct of the intestate, it was one proper for the consideration of the jury, and their conclusion upon it beyond the reach of this court. On the other hand there is no suggestion of an intentional wrong practiced on the plaintiff, and the only question is, whether there was any duty on the part of the defendants to transport him into the tunnel, for it was while going in that he received injury. Of course, the learned judge did not use the term "passenger" as including only those who, for a consideration or otherwise, might acquire the right to be in or on the cars, but to emphasize by contrasting it with the term indicating material substances or matter which necessity or convenience required to be taken from the tunnel. We may start, then, with the proposition that the cars were not intended by the owners for the transportation of human beings.

But the contention of the plaintiff is (1), that the car was one of the facilities for entering the tunnel, and under the contract, the plaintiff entitled to its use; (2) that from the former use of the car there was an implied license that he might ride upon it, and, therefore, he was rightfully there. I am unable to find any foundation for the proposition.

It would not, I suppose, be claimed that, by this contract, the defendants were under any obligation to carry or furnish the intestate the means of carriage for himself from the place where his office or that of the commissioners might be, to the tunnel, whether that office was near to or remote from it.

Nor would the defendants be liable if, while they were

Opinion of the Court, per DANFORTH, J.

running wagons for the transportation of tools or implements from their warehouse, the intestate had, by the acquiescence of the driver, often gone along, until finally, on the way to the tunnel, he received an injury by the overturning of the vehicle, through the negligence or carelessness of the driver. Nor would they be liable if the defendants themselves, going to the tunnel in a carriage driven by their servant, the intestate had got up behind, and the servant, knowing it, had driven carelessly and injured him. If, in either case, or in the case in hand, the mischief had resulted from the personal act of the defendants, done with knowledge of the intestate's presence, they would have been liable, and in either case the servant might be, but I can find no reason or principle upon which the defendants could be charged, in the absence of some personal act, or some authority by them for the act of the servant. Clearly the inspector must find his way as best he could, and at his own risk, to the mouth of the tunnel. His duty of inspection began there. It was to continue until the tunnel was finished. At what point then, if at all, did the obligation of carriage fall upon the defendants? I cannot discover it, nor can I see how the conveyance of the engineer has any relation whatever to the defendants' duty to furnish facilities for inspection. If the shaft had been a rising one, or if the roof of the tunnel was so high that its condition could not be examined from below, it might be the duty of defendants to prepare a scaffold, or furnish a ladder, or other means of access, for without one or the other, or some artificial means, the inspector could not approach the place to be inspected. But however that might be, the defendants could not be called on to carry him up the ladder or along the platform. The contract does not call for that accommodation.

So in the case before us it is plain, upon the testimony, that there was no obstruction in the way of the engineer's entrance into the tunnel, and that no facility was lacking to enable him to complete the work of inspection from the beginning to the end of the tunnel, as then constructed. At

Opinion of the Court, per DANFORTH, J.

the mouth, or opening, the entrance was obvious, and step by step the inspection could have been made, precisely as well and as thoroughly as if the inspector had gone in on a railroad.

There was no impediment. The duty of inspection seems to have been confided to the engineers Ridgway, Larned, Gallery and the decedent. From the testimony of the survivors it appears that the gauge of the track was three feet and a half, the theoretical width of the tunnel twelve feet, and its actual width not uniform. The distance between the track and the sides of the tunnel also varies; on the right hand side it is from four to four and a half feet and six feet. The space on the left hand side is mainly occupied by the air shaft. The track was single, cars going at intervals as occasion required, but only in one direction at any one time. The track and the space outside of the track was, therefore, available for the inspectors. Moreover, they did in fact usually and habitually, although not always avail themselves of that space and travel in and out on foot. It was comparatively seldom that either rode upon a car. Ridgway says, "we could walk down through the roadway. I walked most of the time myself, and was accustomed to see the men walking out of the tunnel and walking in. One could walk on the track or by the side. It is only a question of ease. I can go from one end of the incline to another on foot and do my work, and I do do it, and have been doing it since I went on the work — January, 1885." Larned walked backward and forward to his work; in doing so used the track. Webster, a civil engineer employed by defendants, and of twenty-four years experience in such work, says: "I have never ridden on these cars. I have gone in and out always on foot." Gowen, also a civil engineer employed on the work by the commission, and called by the plaintiff, said: "I did not regard those cars as facilities or means for taking people down or bringing them up. I regard them particularly for bringing out debris and rocks from the heading." There was nothing in the appearance of the cars to serve as an invitation to man. They were unprovided with seats, were wet from the drip of water and

Opinion of the Court, per DANFORTH, J.

dirty from the loads they carried. As they were not furnished for such use, so there was no permission from the defendants or any one of them that they might be so used. But it is said this permission might be implied, because the intestate and others had before ridden upon the cars. Without permission from or duty on the part of the defendants to give it, I cannot see how that result follows. On the contrary, a person so using the car at each time took upon himself the risk, and must abide by its condition and the quality of the attendant at the time he so used it, and was entitled only not to be led into danger.

Negligence is an omission of care and caution in what we do. But the duty to be actively cautious and vigilant is relative, and where that duty has no existence between particular parties, there can be no such thing as negligence in the legal sense of the term. The plaintiff was in no position to complain of the defendants or their servants. The frame and dump the intestate got upon was not a vehicle for his carriage, but an instrument of labor, a mere implement furnished by the defendants to their servants, as they might have provided a man with a basket or barrow, or a mule with panniers to take out the refuse, as in former times was the custom in doing such work. It might have been a scraper or dirt-shovel, or stone-boat or dump-cart drawn by horses. In either case would the owner be liable to one who seeking to use the machine for convenience in personal transportation, received an injury? Certainly not. Nor can he make out a better case, because by the combination of a rail, wheels and stationary power, the same work is done, but more easily.

The benefit of the contract between the defendants and the aqueduct commissioners no doubt extended to the plaintiff's intestate and the other agents of the commissioners, but if I am right in its construction, no liability arose from that contract to furnish the track or car, or other means of entering the tunnel, or do more than not to obstruct the entrance of the commissioners or their agents, and I find nothing else to show how any liability or duty to the plaintiff could arise.

Opinion of the Court, per DANFORTH, J.

However imperfect the track or the car, or however negligent or careless its manager may have been, they were not singly or in combination dangerous, nor would the plaintiff's intestate have been harmed if he had kept away from them. If in going out of or entering the tunnel, or while engaged in the duty of inspection, he had been run over by the car, either from the careless management of the servant of the defendant having it in charge, or from its leaving the track by reason of the imperfection either of the track or the car, a different question would have been presented, one which might well be answered in his favor upon the principles applied in the cases now cited in his behalf, viz.: *Byrne v. N. Y. C. & H. R. R. Co.* (104 N. Y. 362); *Weinhold v. Acker* (49 N. Y. Super. Ct. Rep. 182); *Ackert v. Lansing* (59 N. Y. 646); and, also, *Wendell v. Baxter* (12 Gray, 494).

The actual case is different. The plaintiff had a right to be in the tunnel for its inspection. The contract put the defendants under no obligation to carry him into the tunnel, nor by it did he acquire any right to be upon the car. Nor did he acquire that right through any consent or act or acquiescence on the part of the defendants. All the witnesses agree that no permission was given by the defendants; no evidence tends to show that they even knew the car was at any time so used. The brakeman of the car had known it, but neither his knowledge nor assent could bind the defendants. He was not their agent for that purpose. It is a general proposition that a master is chargeable with the conduct of his servant, only when he acts in the execution of the authority given him. Here the servant had only to go up with loads of stone or dirt and return with the empty cars, the easiest and simplest of duties, with little responsibility, and engaged in an employment requiring only a low degree of intelligence, his discretion at any rate limited to the care and proper disposition of the loads intrusted to him; his position inferior to that of the driver of the wagon or carriage in the cases I have supposed. There is nothing whatever in the record to show that in not resisting the intestate's entrance

Opinion of the Court, per DANFORTH, J.

upon the car, or in consenting to it he was acting in pursuance of any authority conferred on him. He had nothing to do and could, in the nature of things, have nothing to do with human freight.

The law, for reasons of convenience, makes a master liable for the act of his servant, even though the servant, in the performance of his duty, is guilty of a deviation, or a failure to perform it in the safest or best manner, "but where the servant, instead of doing that which he is employed to do, does something which he is not employed to do at all, the master cannot be said to do it by his servant, and, therefore, is not responsible for the negligence of his servant in doing it" (*Mitchell v. Craswell*, 13 C. B. 247); or, as it is elsewhere stated, "where the master has neither ordered the thing to be done, nor allowed the servant any discretion as to the mode of doing it, I cannot see how, in common justice or common sense, the master can be held responsible." (*M'Kenzie v. M'Leod*, 10 Bing. 385.) In the case before us the brakeman was never told, or authorized to carry any person, and if he acquiesced in, or by silence consented to the intestate's going in upon the cars, there is no evidence that in doing so he was acting in the line of his duty, or within the scope of his employment. The deceased had, in fact, ridden upon the car; he had done so under no other permission, a volunteer, but in safety. In each instance, however, he must be deemed to have assumed the risk, and this last time he was unfortunate. The consequences of that misfortune should not be thrown upon the defendants.

In *Beck v. Carter* (68 N. Y. 283), the general proposition is maintained that "where the owner of land expressly, or by implication, invites others to come upon his land, if he permits anything in the nature of a snare to exist thereon, which results in injury to one availing himself of the invitation, and who at the time is exercising ordinary care, such owner is answerable for the consequences." It is also said, however, "if he gives but a bare permission to cross the premises, the licensee takes the risk of accidents in using the premises in the

Opinion of the Court, per DANFORTH, J.

condition in which they are." Among other cases cited is that of *Hounsell v. Smyth* (7 C. B. [N. S.] 731), in which, in denying a recovery, the court said: "No right is alleged; it is merely stated that the owners allowed all persons who chose to do so, for recreation or for business, to go upon the waste without complaint; that they were not churlish enough to interfere with any person who went there. He must take the permission with the concomitant conditions, and it may be perils."

The case at bar lacks even the elements which are so referred to. The plaintiff asserts a right, but has not established it. He does not show that the owners allowed any one to go upon the machine; he simply shows that the inferior servant employed to manage a dump car, did not interfere with those persons who got upon it. In the principal case (*Beck v. Carter, supra*), a recovery was allowed because, by use long continued, the land where the accident occurred had been made, for the time being, a public place, and part of the highway.

In *Sutton v. New York Central, etc., Railroad Company* (66 N. Y. 243), it is held that although a railroad company has by permitting people repeatedly to cross its tracks at a point where there is no public right of passage, given an implied license so to do, it raises no duty to active vigilance to those crossing to guard them from accident; that the licensees under it take the risk of the business. Nothing more can be said in favor of the intestate than that, so far as the machine is concerned, he was upon it by the tacit permission of the defendants' employe; and as between himself and the defendant he was bound to take the equipage as he found it, and the driver or servant with such skill and care as for the time being he exercised. He chose between the machine so equipped and managed, and going in on his own feet. The defendants are in no view to blame either for his choice or for the evil results. On the contrary, the intestate was in the attitude of one consenting to bear a risk as a volunteer, a guest, a

Opinion of the Court, per DANFORTH, J.

servant or bare licensee, and the principle on which cases relating to those classes are determined apply to him. In *Gillshannon v. Railroad Company* (10 Cushing, 228), a laborer on defendant's road while riding on a gravel train, by defendants' consent and for mutual convenience, to his place of labor, was injured by a collision caused by the negligence of the company's servants in charge of the train, and it was held that no action would lie against the company, although both servants were not in a common employment. The court were against a recovery upon two grounds: (1.) The immunity of the master from liability to a servant for injuries caused by the negligence of a co-servant. (2.) Because he was injured while enjoying a privilege merely permitted to him and of which he availed himself to facilitate his own labor. The first ground has no application here, but the plaintiff's intestate is within the last alternative. The defendants' business did not concern him, nor was the machine or manager provided for his use, and it would be great injustice to hold the defendants liable for an injury to one whose presence at the place of danger was unsolicited and for whose safety there was no reason within their knowledge to provide. The case of *Eaton v. Delaware, Lackawanna & Western Railroad Company* (57 N. Y. 382), is an authority more in point than those before cited. After an elaborate discussion it is there held that conductors of freight trains cannot create any liability, on the part of their principals, to a person taken by them on such trains, unless the principal in some way assents to it, and that a duty to be careful toward him could only spring up on the part of the principal by an act on the conductor's part, coming within the scope of his authority. It is, therefore, unnecessary to pursue the subject further, and as we are of the opinion that there was no testimony showing either that the defendants permitted the intestate to use the cars as a means of entering the shaft, or of any duty owing by them in that respect, but on the contrary that he voluntarily assumed the risk from which he suffered, we are constrained to hold that the learned trial judge erred in submitting the case to the jury.

Statement of case.

The judgment should, therefore, be reversed, and a new trial granted with costs to abide the event, and it is so ordered.

All concur.

Judgment reversed.

VALENTINE DIEFENTHALER, Appellant and Respondent, v.
THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF
NEW YORK, Appellant and Respondent.

JULIA FRIEND, Appellant, v. THE SAME, Respondent.

The provisions of the act of 1880 (Chap. 550, Laws of 1880), providing for vacating and modifying assessments for local improvements in the city of New York, apply only to cases of assessments which are a lien at the time of the commencement of proceedings.

The remedy given by said act to an individual who has paid an illegal or irregular assessment applies only where an assessment for the same improvement upon the lands of other parties has been vacated or reduced by the commissioners appointed under the act.

In an action, therefore, to recover back a proportionate part of moneys paid upon an assessment *prima facie* valid, and which created an apparent lien upon the land assessed, where the facts rendering a portion of the assessment invalid were all *de hors* the record, it is no defense that the assessment has not been vacated or reduced under and in pursuance of said act.

The six years statute of limitations applies to such a cause of action, and this is so, conceding the necessity of a provision in the judgment vacating or reducing the assessment; this is a mere incident to the legal cause of action to recover back the money paid.

Although an equitable action may have for its object the accomplishment of the same end as one at law and be based upon the same cause of action, where the remedy sought in equity is a mere incident to the main obligation, and that is a legal one, the legal limitation applies.

It seems where an assessment has been paid, a court of equity has no jurisdiction of an action brought simply to have it set aside.

(Argued October 16, 1888; decided November 27, 1888.)

THESE are cross appeals from judgments of the General Term of the Supreme Court in the first judicial department, made March 2, 1888, which affirmed in each case a judgment entered upon orders overruling plaintiff's demurrer to the sixth

111	331
112	222
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113	662
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115	86
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122	602
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126	622
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134	77
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141	218
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161	22

Statement of case.

defense set up in the answer and sustaining the demurrer to the seventh defense set up in the answer. (*Mem.* of decision below, 47 Hun, 627.)

The nature of the actions and the substance of the defenses demurred to are stated in the opinion.

Herbert A Shipman for plaintiffs. The complaint alleges facts sufficient to constitute a cause of action against the defendant. (*Jess v. Mayor, etc.*, 103 N. Y. 536, 540; *Strasburg v. Mayor, etc.*, 87 id. 452; *In re Lima*, 77 id. 170; *In re Hughes*, 93 id. 513; *Delano v. Mayor, etc.*, 32 Hun, 144; Laws of 1873, chap. 312, § 18; Id. chap. 613, § 3.) The language of the act of 1874 (Chap. 312), itself shows that it was not intended to apply to a case of this character. (Cooley's Const. Lim. [3d ed.] 57.) The act of 1858 (Chap. 338, as amended by the act of 1874, chap. 312), is only applicable when the lien of the assessment exists. (*In re Lima*, 77 N. Y. 170; *In re Hughes*, 93 id. 513.) The legislature cannot deprive a party of a substantial right under pretense of regulating a mode of procedure. (*Taylor v. Porter*, 4 Hill, 144.) If the construction of the prohibitory clause of the act of 1874, claimed by the defendant, is the true one, then the act is unconstitutional. It is competent for the legislature to deprive a court of equity of the power of giving a particular remedy, but it cannot deprive a party of all remedy. (Cooley's Const. Lim. [3d ed.] 239; *Lennon v. Mayor, etc.*, 55 N. Y. 361; *Strasburg Case*, 87 id. 456; *Taylor v. Porter*, 4 Hill, 144.) The fact that "prices of the principal part of the work necessary to perform and perfect said improvement were fixed by the commissioner of public works," etc., renders the assessment as to such items, as are not made subject to public competition, invalid. (*In re Merriam*, 84 N. Y. 596.) This defect cannot be held jurisdictional. (*In re Merriam*, 84 N. Y. 596.) It was necessary for the plaintiff to proceed in equity to vacate such proceedings before he could recover back moneys paid thereon. (*Brundage v. Village of Portchester*, 102 N. Y. 497.) Where the legal remedy is imperfect the statute bar, which relates to the equitable remedy

Statement of case.

sought, will govern the case. (*Rundle v. Allison*, 34 N. Y. 180.) Assessments being of the nature of mortgages and judgments, are subject to the same statute bar. (*Mayor, etc., v. Colgate*, 12 N. Y. 140; *Fisher v. Mayor, etc.*, 67 id. 74.) The case is, therefore, governed by the twenty year statute of limitations. (Code of Civil Pro. §§ 379, 381; *Rundle v. Allison*, 34 N. Y. 180.) This case is governed by the provisions of section 388 of the Code of Civil Procedure; it being a case where no special limitation has been prescribed; (*Miner v. Beekman*, 50 N. Y. 337.)

D. J. Dean for defendant. This action cannot be maintained as an action in equity to reduce the assessment. (Laws of 1882, chap. 410, § 899; *Id.*, chap. 580, § 7; *Lennon v. Mayor, etc.*, 55 N. Y. 366; *Dolan v. Mayor, etc.*, 62 id. 472; *Astor v. Mayor, etc.*, *Id.* 580; *Bank of Chenango v. Brown*, 26 id. 467; *Ensign v. Barse*, 107 id. 329.) An action in equity, to have the assessment declared illegal, and to recover the money that has been involuntarily paid therefor, is maintainable only when there is no statutory prohibition. (*Strasburgh v. Mayor, etc.*, 87 N. Y. 454; *Knapp v. City of Brooklyn*, 97 id. 520; *Mayer v. Mayor, etc.*, 101 id. 284.) Under the act of 1858 the assessed person could receive relief only while a lien, created by the assessment, existed. (*In re Lima*, 77 N. Y. 170.) If the demand for equitable relief contained in the plaintiff's complaint be disregarded, and the action be considered to be an action at law to recover money wrongfully received by the defendant, still it cannot be maintained, because no order modifying the assessment has been made in a direct proceeding brought by the plaintiff. (*Jex v. Mayor, etc.*, 103 N. Y. 536; *Bruecher v. Village of Port Chester*, 101 id. 240; *Purcell v. Mayor, etc.*, 85 id. 330; *Wilkes v. Mayor, etc.*, 79 id. 621.) The order reducing the assessment in question was made upon the petition of Mr. Hunter, and availed to relieve his lands from the assessment to the extent indicated, and does not inure to the benefit of the plaintiff. (*In re Delancey*, 52 N. Y. 80.) The plea of the six year

Opinion of the Court, per PECKHAM, J.

statute of limitations presented a defense. (*Brundage v. Port Chester*, 31 Hun, 129; 102 N. Y. 494; *Parsons v. City of Rochester*, 43 Hun, 258; *Brehm v. Mayor, etc.*, 104 N. Y. 186; *Jex v. Mayor, etc.*, 103 id. 536; *Clowes v. Mayor, etc.*, 47 Hun, 539; *Selpho v. Brooklyn*, 9 N. Y. S. Rep. 700; *Robinson v. Brooklyn*, Id. 716; *Van Ness v. Mayor, etc.*, Gen. Term, first department [not reported]). The plaintiff cannot extend the statute by demanding equitable relief; he does not need equitable relief. (*Brundage v. Village of Port Chester*, 31 Hun, 29; *Hoyt v. Tuthill*, 33 id. 196; *Borst v. Corey*, 15 N. Y. 505; *Scott v. Stebbins*, 27 Hun, 335; 91 N. Y. 605.) The formal relief demanded is not controlling as to the nature of the action. (*Bell v. Merrifield*, 109 N. Y. 202.) There is no foundation for the claim that the city holds the money as trustee. (*Clowes v. Mayor, etc.*, 47 Hun, 539; *Price v. Mulford*, 107 N. Y. 303; *Carr v. Thompson*, 87 id. 160; *Pierson v. McCurdy*, 33 Hun, 520; *Robinson v. Brooklyn*, 9 N. Y. S. Rep. 716.) The right of action accrued at the time of payment, and not at the time of filing the claim for the return of the money. (*Dickinson v. Mayor, etc.*, 92 N. Y. 584; *Taylor v. Mayor, etc.*, 82 id. 10.) Where money is paid by mistake of fact, the statute runs from the time of payment, and not from the time the mistake was discovered. (*Clarke v. Dutcher*, 9 Cow. 674.)

PECKHAM, J. These two actions were brought to recover back a certain proportion of moneys paid by the plaintiffs on assessments levied upon their lands in the city of New York. The facts in the two cases are precisely the same and relate to the recovery of money paid upon assessments *prima facie* valid, and which created an apparent lien upon the land assessed, and where the facts rendering a portion of the assessment invalid were all *de hors* the record, and the plaintiffs were entirely ignorant of them, and could not have obtained knowledge in regard to them by an inspection of the record or the papers attached; nor would they have appeared in the proceedings of a purchaser to enforce the lien of the same. The

Opinion of the Court, per PECKHAM, J.

answer in each case, among other things, set up as a sixth defense that the assessments had not been vacated or reduced pursuant to any of the provisions of chapter 550 of the Laws of 1880, or the laws amendatory thereof, and that the action was not commenced within a year after the confirmation of the assessment. The defendants further answering, and as a seventh and further defense, stated that the cause of action alleged in the complaint accrued more than six years before the commencement of the action, exclusive of any time during which the commencement of the action had been stayed, and that the right to maintain the action was complete more than six years and thirty days before its commencement. The plaintiff demurred to the sixth and seventh defenses above stated.

We think the courts below were right in their construction of the statute of 1880, and that it applies only to cases of assessments where a lien exists at the time of the commencement of the proceedings. The whole scope of the act shows that its purpose was to modify, vacate or reduce assessments then existing, in accordance with what the commissioners therein appointed should regard to be substantial justice. The remedy given to an individual who had paid money under an assessment for any reason, illegal or irregular, by the tenth section of the act of 1880 does not include such a case as the present. The plaintiffs simply allege that upon the petition of some third party an order of the Supreme Court was made on the 10th day of January, 1884, by which the assessment upon the lots of the petitioner in that proceeding was reduced forty-eight and three-tenths per cent. That was not a modification or reduction of the assessment made by the commissioners appointed under the act of 1880, and it was only upon such a modification or reduction that anyone who had, prior to the passage of the act paid an assessment, was entitled to a reduction equal in proportion to that made by the commissioners upon the assessment of any third party for the same local improvement. The fifth section of the act provides that the commissioners should make their decision in writing on or

Opinion of the Court, per PECKHAM, J.

before the 30th day of September, 1881, on which day their jurisdiction and authority under the act were to cease. In other words, the act provided for a reduction or vacation of assessments then existing.

There being no allegation that any reduction had been made by the commissioners in regard to this assessment, and it appearing that the order setting aside the assessment, so far as regards the third party, was made in January, 1884, more than two years after the commissioners had ceased to have any authority under the act, it is conclusive evidence that no such order was made by them. A reading of the whole act shows that it was of the same nature as that of 1858 referred to in the decision of this court in *Jex v. Mayor, etc.* (103 N. Y. 536). Upon the defendant's appeal from the order and judgment, sustaining the plaintiff's demurrer, they should be affirmed.

The plaintiffs appeal from the order and judgment of the General Term, overruling their demurrer to the defense of the six years statute of limitations.

It must now be considered as settled by this court that where lands are covered by an assessment which appears to be valid on its face, and to be an apparent lien upon such lands, but which assessment is, in fact, by reason of matters *de hors* the record illegal and void, even in part, if the owner has involuntarily paid the assessment in ignorance of such facts, he may, on discovery thereof, maintain an action to set aside the illegal portion of such assessment, and to recover back a proportionate part of the money so paid. (*Strusburgh v. Mayor, etc.*, 87 N. Y. 452.) It has also been held that in the case of an assessment valid on its face, but in reality void for want of jurisdiction on the part of the assessors to make it, if the owner of the property has paid the same involuntarily, he may maintain an action to recover back the amount thus paid, without first setting aside the assessment. (*Bruecher v. Village of Port Chester*, 101 N. Y. 240; *Jex v. Mayor, etc.*, 103 N. Y. 536). In regard to those cases where the assessment is invalid, not from any want of jurisdiction existing in the persons who

Opinion of the Court, per PECKHAM, J.

levied it, but from some other cause, the question of what statute of limitations is applicable where the plaintiff commences his action to set aside the assessment, and to recover back the moneys paid by reason of it, has not been settled.

The plaintiffs claim that at least the ten years, if not the twenty years, statute applies in such a case. They say it is an application to a court of equity to set aside the assessment, and that such assessment must be set aside before they can recover back the money paid by reason of it. This reasoning, they say, brings it within the ten years limitation, but they go further and say the twenty years' statute applies because an assessment is like a judgment or mortgage upon property, the lien of which lasts as long as that of a mortgage, and that there is no presumption of payment inside of twenty years, and that they have the same time in which to commence their action that the city would have to compel payment of the assessment by enforcing the lien thereof.

We think there is no plausible ground for the latter claim. In regard to the other question, we think the six years statute applies. In the first place the assessment having been paid by the plaintiffs, there is no lien remaining upon their lands and no cloud upon their title. A court of equity cannot entertain, as I think, an action to set aside an assessment as a cloud upon title after the assessment has been paid, if that be the only relief sought. The answer would be, there is no cloud, because there is no assessment. The real, substantial, governing cause of action in a case like this is the fact that the defendant has money in its hands which, *ex aequo et bono*, it ought to pay back to the plaintiffs, and the action is essentially one to recover back money which the defendant has received from the plaintiffs, but has no legal right to withhold from them.

So long as a party can unite in the same action, his right to have an assessment, which is *prima facie* legal, declared invalid with his right to recover back the money paid thereon, the whole forming one substantial cause of action, there is no

Opinion of the Court, per PECKHAM, J.

color to the claim that the real cause of action lies in the necessity of a judgment vacating the assessment. The setting aside of the assessment in such a case is a mere incident to the legal cause of action to recover back the money paid, and that being so, the legal limitation of six years in which to commence the action should be applied.

In *Borst v. Corey* (15 N. Y. 505), it was held that an action to enforce an equitable lien for the purchase-money of land was barred by the lapse of six years after the debt had accrued. In that case the land had been sold to the defendant, and his debt to the plaintiff for the purchase-money became due immediately upon the conveyance of the land to him. More than six years after that time the plaintiff commenced an action to enforce his equitable lien upon the land for the payment of the purchase-price thereof. At that time the relief sought, that is, the sale of the premises under the equitable lien thereon for the purchase-price, could only have been awarded by a court of equity. But for six years after the conveyance the plaintiff could have commenced his common-law action against the defendant to recover the debt, that is the purchase-money which became due immediately upon the conveyance being made. The court held that the lien upon the land for the payment of the purchase-money was merely an incident to and must stand or fall with the debt, and the action to recover the debt being barred by the legal statute of limitations, the action in equity could not be sustained. Although decided upon the provision of the statute making the limitation at law applicable to a suit in equity (2 R. S. 301, § 49), yet I refer to that case for the purpose of showing that, although an equitable action may have for its object the accomplishment of the same end as one at law, and be founded upon the same cause of action, yet where the remedy sought in equity is a mere incident to the main obligation owing by the defendant, and which is a wholly legal one, the legal limitation applies, because the cause of action is substantially a legal one.

The plaintiffs cite many cases to show that equity takes

Statement of case.

jurisdiction of an action to set aside an assessment, even though it be absolutely void for want of jurisdiction, providing such lack of jurisdiction does not appear on its face, and would not appear, in any proceedings taken under it; and they claim that this is substantially an action of that nature.

Undoubtedly, even in cases where there is no jurisdiction on the part of the assessors to make the assessment in question, if that fact do not appear, courts of equity, where the assessment has not been paid, do take cognizance of such cases. Where, however, the assessment has been paid, I do not think a court of equity would take or would have jurisdiction in an action brought simply for the purpose of having such an assessment set aside; and that for the reasons already stated.

We are of opinion, therefore, that the plaintiff's demurrer to the defendant's answer setting up the six years' statute of limitations was properly overruled, and the order and judgment of the General Term upon both appeals should be affirmed without costs to either party as against the other.

All concur.

Judgment accordingly.

EMILY D. JEX et al., Executors, etc., Appellants, v. THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Respondent.

The six years statute of limitation applies to a cause of action to recover back the amount of an assessment for a local improvement paid to the city of New York, where the assessment was void for want of jurisdiction. *It seems* it is wholly unnecessary in such a case to set aside the assessment, the cause of action is one of a legal nature only.

In pleading the statute it is sufficient to aver that more than six years have elapsed since the cause of action accrued; it is not necessary to aver that, in addition to the six years, the thirty days allowed the city by its charter (§ 105, chap. 835, Laws of 1873), to pay the claim after presentation and during which time the claimant is prohibited from bringing suit, has also elapsed.

(Argued October 16, 1889; decided November 27, 1888.)

111	339
135	468
111	839
141	218

Statement of case.

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made January 23, 1888, which reversed an order of Special Term and a judgment entered thereon sustaining a demurrer to the seventh and eighth paragraphs of the defendant's answer herein.

This action was brought to have an assessment upon plaintiff's premises, in the city of New York, for a local improvement adjudged invalid, and to recover back the amount thereof. The complaint alleged that the assessment was levied without jurisdiction and was void, and that plaintiff paid the same in ignorance of these facts.

The paragraphs of the answer demurred to are as follows:

"*Seventh.* Further answering, and, as a further and separate defense, the defendants allege that the cause of action contained in said complaint accrued more than six years before the commencement of this action, and that the right to make the demand necessary to maintain said cause of action was complete more than six years before the commencement of this action.

"*Eighth.* Further answering the said complaint, the defendants allege that more than one year has elapsed since the death of the plaintiffs' testator before the commencement of this action."

Herbert A. Shipman for plaintiffs. Where, as against other parties, the lapse of six years is sufficient to constitute a defense, against the defendants, six years and thirty days must elapse. (*Brehm v. Mayor, etc.*, 104 N. Y. 186.) The assessment being presumptively valid, an action in equity must first be brought to vacate it; and actions in equity are not governed by the six-year statute of limitations. (*Brundage v. Village of Port Chester*, 102 N. Y. 498; *Jex v. Mayor, etc.*, 103 id. 541; *Scott v. Onderdonk*, 14 id. 7; *Johnson v. Elwood*, 53 id. 431; *Marsh v. City of Brooklyn*, 59 id. 280.) It is only in the case where a defect is such that it must appear upon the proof that must be made

Statement of case.

to sustain proceedings under the assessment that no proceeding in equity will be necessary. (*Horn v. Town of New Lots*, 83 N. Y. 100, 104; *Marsh v. City of Brooklyn*, 59 id. 280; *Hatch v. Buffalo*, 38 id. 276; *Crook v. Andrews*, 40 id. 547; *Johnson v. Elwood*, 53 id. 435; *Allen v. Buffalo*, 39 id. 386; *Washburne v. Burnham*, 63 id. 132-134; *Coleman v. Shattuck*, 62 id. 348-358.) As the defects, although one of them is jurisdictional in character, are such that they would not appear in proceedings by a purchaser to enforce the lien of the same, this assessment, though void in fact, is, nevertheless, presumptively valid, and must be vacated before the money paid thereunder can be recovered. (*Brundage v. Port Chester*, 102 N. Y. 497; *Hatch v. Buffalo*, 38 id. 276; *Hassen v. Rochester*, 65 id. 516; *Rumsey v. Buffalo*, 97 id. 114; *Stuart v. Palmer*, 74 id. 183; *Morris v. Townshend*, 102 id. 387; *Clark v. Davenport*, 95 id. 477; *Guest v. City of Brooklyn*, 69 id. 506.) This action is governed by the twenty-year statute of limitations. (*Mayor, etc., v. Colgate*, 12 N. Y. 140; *Fisher v. Mayor, etc.*, 67 id. 74; Code of Civ. Pro. §§ 379, 381.) Section 402 of the Code of Civil Procedure, which takes the place of section 102 of the old Code, simply provides that, under certain circumstances, the time limited may be extended; that is, in case a party dies leaving a cause of action which survives, and the time limited for the commencement of the action has not expired, his representatives shall, in any event, have one year thereafter within which they can commence an action; but, unless the cause of action would have been barred within the last-named period, the section has no effect whatever. (*Sandford v. Sandford*, 62 N. Y. 553.)

D. J. Dean for defendant. The statute of limitations applicable to this case is the six-year statute, and it begins to run at the date of payment. (*Brundage v. Village of Port Chester*, 31 Hun, 129; 102 N. Y. 494; *Parsons v. City of Rochester*, 43 Hun, 258; *Brehm v. Mayor, etc.*, 104 N. Y. 186; *Jex v. Mayor, etc.*, 103 id. 536; *Hoyt v. Tuthill*, 33

Opinion of the Court, per PECKHAM, J.

Hun, 196; *Borst v. Corey*, 15 N. Y. 505; *Scott v. Stebbins*, 27 Hun, 335; 91 N. Y. 605; *Clarke v. Dutcher*, 9 Cow. 674.) The statute has been correctly pleaded. (104 N. Y. 186; *Howell v. Babcock*, 24 Wend. 488; *Benjamin v. De Groot*, 1 Denio, 151; *Nelson v. Lounsbury*, 3 Barb. 135.) The right of action accrued at the time of payment, and not at the time of filing the claim for the return of the money. (*Dickinson v. Mayor, etc.*, 92 N. Y. 584; *Taylor v. Mayor, etc.*, 82 id. 10.)

PECKHAM, J. In the above entitled case the plaintiffs alleged that the assessment was void, because there was no jurisdiction to levy the same, and they seek to recover back the amount of the assessment paid to the city. The defendant sets up the six-years statute of limitation. As this is a case where the plaintiffs, in order to recover, need not procure the setting aside of the assessment, the claim is incontestably one of a legal nature only. They commence their action for the recovery of money thus paid upon a void judgment, and when they prove that the judgment was void, because there was no jurisdiction in the parties who made the assessment and that they paid the money involuntarily, they show a right to recover within the authorities cited in the opinion in the immediately preceding case, and it is wholly unnecessary in such case to set aside the assessment. A point is made that the eighth defense of the defendant having been demurred to, the demurrer is unquestionably good and should have been sustained. A reading of the seventh and eighth paragraphs of the defendant's answer shows that the eighth paragraph was not, and was not intended to be, a separate defense, it was part and parcel of the seventh, in that, at the commencement thereof, the defendant uses this language: "Further answering, and as a *separate* and further defense, the defendants allege," etc., thus showing that the defendants then assumed to be setting up a separate defense from anything that had gone before. The fact that there is added in a separate paragraph (paragraph 8) this language, "*further* answering the said complaint the defendants allege," etc., is conclusive evidence that it was not

Statement of case.

meant as a *separate*, but simply a further defense. Whether it was treated by the Special and General Terms as a separate defense, the demurrer to which was properly overruled, is of no importance, although we do not believe for one moment that either court assumed to decide that the eighth was an actual, separate defense, and, as such, a good one.

We think, also, that the statute was properly pleaded in this case. (See *Dickinson v. Mayor, etc.*, 92 N. Y. 584.) The facts in the *Brehm Case* (104 N. Y. 186), do not take this one out of the authority of the case of *Dickinson v. Mayor, etc.* (*supra*).

The order and judgment of the General Term reversing that of the Special Term should be affirmed, with costs.

All concur.

Judgment accordingly.

In the Matter of the Appeal from the Assessment of Taxes upon the Legatees, under the Will of WILLIAM CAGER, by the Surrogate of Cayuga County.

Under the act of 1885 (Chap. 488, Laws of 1885), providing for the taxing of "gifts, legacies and collateral inheritances," the tax is upon the individual, and can be imposed only when the interest devised to each beneficiary exceeds \$500, the limitation provided by the statute. (§ 1.)

A tax imposed under said act, before the amendment to it of 1887 (Chap. 713, Laws of 1887) exempting legacies to adopted children went into effect, was not affected by the latter act.

The will of C. gave his residuary estate to his wife M. "to be used and enjoyed and *at her disposal* during the term of her natural life." One-third of said estate "that may remain" at the decease of his said wife, the testator gave to an adopted daughter during life; the other two-thirds and the remainder of the one-third to four persons named, who were described as "the present heirs" of M. *Held*, that, upon the death of C., his widow took a life estate with a limited power of disposition during her life, for her use and enjoyment, and any interest in the other beneficiaries was dependent upon the contingency of the exercise by her of this power of disposition.

The appraiser appointed by the surrogate to appraise the value of the respective interests reported that, with such a construction, the gifts over

111	343
131	280

111	343
137	408

111	343
143	330

111	343
152	100

111	343
171	518

Statement of case.

had no market value. *Held*, that while said gifts were sustainable as valid executory devises and the beneficiaries might eventually take a valuable estate, yet as this contingency rendered the present appraisable value of such interest incapable of any correct or reasonable approximate valuation, there was no basis for the imposition of a tax.

Where the present value of property devised to one, with a limitation over to others upon the happening of some event, which may or may not occur, can be ascertained, a ground for an approximate estimate of the value of the ultimate devise appears, and it may be made; but where the question as to whether any property at all will pass under the limitation over, depends upon the will of the first taker, there is no rule by which its value can be determined.

As to whether an appraisal of the value of said gifts over for the purposes of taxation may be made if they eventually come to the possession of the beneficiaries when that event occurs, *quære*.

(Argued October 16, 1888; decided November 27, 1888.)

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, made December 30, 1887, which reversed a decree of the surrogate of the county of Cayuga taxing certain beneficiaries named in the will of William Cager, deceased, under the collateral inheritance act (Chap. 483, Laws of 1885), and which reversed a decree of said surrogate affirming the assessment and taxation upon appeal under said act. (Reported below, 46 Hun, 657.)

Said Cager died in Cayuga county in May, 1886, leaving a will, the material portions of which are set forth in the opinion. The will was admitted to probate on April 11, 1887; the surrogate appointed an appraiser who made his report, in which he stated that he found the value of the collateral estates to depend upon the construction given to the will. In case the widow took, under the will, only a life estate, he fixed the valuation and tax upon the shares as follows:

Name.	Valuation.	Tax.
Mary Griffin	\$313 40	\$15 67
Ezra Griffin.....	640 96	32 05
William Griffin.....	640 96	32 05
George Griffin.....	640 96	32 05
Frank Griffin.....	640 96	32 05

Statement of case.

The report concludes as follows :

" If the court find, on the law, that the widow has such a life estate that she may use the principal, or has the absolute disposal by will, gift or otherwise, in her lifetime, I do not think a present market-value could be attached to any remainder.

" If this widow has an absolute disposition of the property in her lifetime, I do not think the life estate in Mary Griffin, and the remainder in her children, to be of any market-value.

" If the court finds that the estate in the widow is an enlarged life estate, then I cannot say, on any theory, what the remainder would be worth in market, and report that, in my opinion, it would be a proper case for a future appraisal and assessment to take place after the death of Mary Cager."

The surrogate assessed the values of the interests as stated in the report, and taxed the beneficiaries the amounts therein specified.

Charles F. Tabor, attorney-general, for appellant. A retro-active operation will not be given to a statute in the absence of a precise declaration when such a construction would have the effect to divest rights already accrued, or effect a status already established. (*Ensign v. Barse*, 107 N. Y. 343; *Mongeon v. People*, 55 id. 613) If any such effect must be given to the act of 1887, the act was unconstitutional. (*Westervelt v. Gregg*, 12 N. Y. 202; *People v. Comrs., etc.*, 53 Barb. 70.) Taxation is the rule and exemption the exception, and must be clearly established; if the exemption is doubtful, the decision should be in favor of the tax. (*People ex rel. v. Comrs., etc.*, 76 N. Y. 64; *People ex rel. v. Davenport*, 91 id. 571-586.) The will gave only a life estate to the widow. (*Smith v. Bell*, 6 Pet. 68; *Wager v. Wager*, 96 N. Y. 173; *Ackerman v. Gorton*, 67 id. 64; *Boyd v. Strahan*, 36 Ill. 358; *Welsh v. Woodbury*, 11 N. E. Rep. 762.) The words "and at her disposal" in this will must be held to mean, taken in connection with the words "during the term of her natural life, followed by the provision made

Statement of case.

for the adopted daughter and her children, that the widow was to have only the control, management and use of the property during her life." (*Taggart v. Murray*, 53 N. Y. 233, 237.) Under the Revised Statutes a valid executory devise can be limited after a fee, upon the contingency of the non-execution of an absolute disposing power vested in the first taker. (R. S. [7th ed.], part 1, chap. 1, tit. 2, p. 2178, §§ 32, 33, art. 1; *Greyston v. Clark*, 41 Hun, 125, 133; *Wells v. Seeley*, 47 id. 109; *Spencer v. Strait*, 38 id. 228.) The tax accrues at the decease of the person from whom the estate passes, and this is so whether the estate passes in actual enjoyment, directly or remotely, upon the termination of an intervening life estate or term of years. (*Appeal of Mellon*, 114 Penn. St. 564.) Because there may be difficulty in arriving at the proper basis for fixing the value of the estate of Mary Griffin and her children, is not a good reason for not making an appraisal at all. (*People v. Coleman*, 107 N. Y. 542; *In re McPherson*, 104 id. 321.) Expectant future estates, as defined in the statutes, include all remainders, whether vested or contingent, and, as such, are descendible, devisable and alienable in the same manner as estates in possession. (*Dodge v. Stephen*, 105 N. Y. 588.)

A. P. Rich for respondents. If the gift in the first clause of the will by the testator, absolutely to his wife of all of his property, both real and personal, is not limited by the subsequent words in the same clause, so that she does not have the absolute power of disposal, then the subsequent clause, giving the remainder to Mary Griffin and her children, is void for repugnancy, and the widow takes a fee in the real property, and the absolute ownership of the personal property. (*Cohen v. Cohen*, 4 Red. 48; *Tyson v. Blake*, 22 N. Y. 558; *Campbell v. Beaumont*, 91 id. 464; *Thomas v. Pardee*, 12 Hun, 151.) If the first clause of the will does limit the absolute power of disposal of the property, then the widow takes a life estate in all the property, with full power to dispose of the same, or any portion thereof, during her life, for her use

Opinion of the Court, per RUGER, Ch. J.

and enjoyment, and what remains at her death, if any, goes to Mary Griffin and her children. (*Spencer v. Strait*, 38 Hun, 228; *Smith v. Van Ostrand*, 64 N. Y. 278; *Terry v. Wiggins*, 47 id. 512.) The estate given to Mary Griffin being less than \$500, would not be liable to an assessment in any event. (*In re Smith*, 5 N. Y. S. R. 380; *In re Astor*, 14 id. 478.

RUGER, Ch. J. While we concur in the reversal by the General Term of the decree of the surrogate, imposing taxes upon the interest devised, to some of the legatees, by the will of William Cager, we do not approve of the reasons assigned therefor by that court. So far as a tax was levied upon the life estate, attempted to be devised to Mary Griffin, its value as assessed by the appraiser being less than \$500, it was not subject to taxation by the law under which the proceeding was instituted. (§ 1, Chap. 483, Laws of 1885.)

That act was intended to authorize the imposition of taxes upon devises to collateral relatives and strangers, only when the estate devised to them, individually, exceeded in value the sum of \$500. The tax is upon the individual, and can be imposed only when the particular interest devised exceeds in value the amount of the limitation provided by the statute. So, too, the question in this case is not affected by the amendment made to the law of 1885, by chapter 713 of the Laws of 1887, exempting legacies to adopted children from the operation of the law, as the tax, in this case, was adjudicated and imposed by the surrogate April 26, 1887, and before the amendment took effect.

We are thus brought to the only question in the case, which is, whether the children of Mary Griffin took such an interest in the property devised by the will of William Cager as subjected them to the payment of a tax thereon by force of the acts referred to? This question is to be determined by a consideration of the provisions of that will. The portions affecting the question involved read as follows:

“*First.* After all my lawful debts are paid and discharged,

Opinion of the Court, per RUGER, Ch. J.

I give, devise and bequeath all my estate, both real and personal, of what nature and kind soever, to my wife, Mary Cager, to be used and enjoyed, and *at her disposal* during the term of her natural life.

"*Secondly.* I give and devise one-third of my real estate and personal property, *that may remain* at the decease of my wife Mary Cager, to my adopted daughter Mary Griffin, that is to say, the use of said one-third during her natural life.

"*Thirdly.* I further devise and bequeath, at the decease of my wife Mary Cager, the *remaining* two thirds of the real estate and personal property to the present heirs of the aforesaid Mary Griffin, namely, Eva Griffin, William C. Griffin, Frank Griffin and George Griffin, share and share alike.

"I further devise and bequeath, that at the decease of my adopted daughter Mary Griffin, the one-third (as above stated) of which she has had the use, shall be divided between the present heirs of aforesaid Mary Griffin, share and share alike."

The report of the appraiser, appointed by the surrogate to appraise the value of the property devised to the various legatees, shows that he assessed the value of the estate devised, respectively, to the children of Mary Griffin, upon two theories, leaving the question to the surrogate to determine upon which theory the tax, if any, should be assessed. Upon the theory that the widow took a life estate only in the property, he found the value of that devised to the several children of Mary Griffin to be the sum of \$640.96 each; but in case the interest devised to the widow was an estate in fee, or a life estate with power of disposition, he was of opinion that such legacies had no market-value whatever.

The surrogate adopted the former view and assessed the value at the sum named by the appraiser. In this we think he erred. We are of the opinion that the widow took a life estate in the property devised with a limited power of disposition for her use and enjoyment, and that any interest in the other legatees was dependent upon the contingency whether the power of disposition was exercised by the life tenant during her life. The meaning and effect of the will must be

Opinion of the Court, per RUGER, Ch. J.

sought in the language employed by the testator, and when that is discovered, must be carried into effect by the court.

The language giving all of his estate to his widow, to be used and enjoyed and at her disposal, followed, as it is, by a limitation over of such of the estate as might remain at the decease of his wife, clearly imports an intention to confer upon the widow the power to dispose of the *corpus* of the estate. (*Van Horne v. Campbell*, 100 N. Y. 287; *Smith v. Van Ostrand*, 64 id. 278; *Terry v. Wiggins*, 47 id. 512.)

We think, however, that the power of disposition given to the widow was not intended to be absolute and unconditional, but was limited by the language devising the property, for her use and enjoyment during her life, and did not give her the power of disposing of it by will. This limitation, therefore, operated as a restraint upon the power of alienation, and prevented the estate devised to her, from being defined as an absolute estate in fee.

The devises, therefore, to Mary Griffin and her children were not in any sense repugnant to the prior estate, and may be sustained as valid executory devises. (Authorities *supra*.) The effect of these conclusions is to destroy the basis upon which the surrogate proceeded in imposing the tax and justified the reversal of his order. While it is possible that the legatees may eventually take a valuable estate, under the will of William Cager, that event, being contingent upon the non-exercise by his widow of the power of disposition, renders the present appraisable value of such interest incapable of any correct or reasonably approximate valuation. When the present value of property, which is devised to one with a limitation over to others, upon the happening of some event which may or may not occur, can be ascertained, then a ground upon which an approximate estimate of the value of the ultimate devise appears, and it may be made; but when the question as to whether any property at all shall pass under the limitation over, and, if so, how much, depends upon the will of the first taker, we are unable to see any rule by which such value can be determined.

Statement of case.

In the case first mentioned, the act enables a tax to be imposed and collected upon the ulterior devisees, through the medium of a bond to be given by the respective legatees, payable when they come into the possession of the devised property. (§ 2 chap. 483, Laws of 1885.) In the latter case, however, there is no basis upon which the value of the devise can be appraised, and no foundation for the imposition of any tax and the provision for the giving of a conditional bond is, therefore, wholly inapplicable.

Whether an appraisal of the value of these devises, for the purpose of taxation, may be made when they eventually come to the possession of the devisees, we are not called upon now to determine. It may be that the tax will be altogether lost to the state if an appraisal is not now allowed; but if so, the fault lies in the act itself and not in the construction which its language requires to be put upon it.

The order of the General Term should, therefore, be affirmed.

All concur.

Order affirmed.

JAMES E. LYON, Appellant, v. TRENOR W. PARK et al.,
Respondents.

The remedy against a foreign administrator, in his representative character, to charge the assets of his intestate for a debt or liability of the decedent, is governed by the law of the jurisdiction, and must be pursued in the legal tribunals of the state or country where the decedent resided at the time of his death and where administration was granted.

Although under the Code of Civil Procedure (§ 755), an action in no case abates by the death of a party where the cause of action survives, as an application to the court is necessary to authorize its revival or continuance, the court may, on the ground of inexcusable *laches*, and, where otherwise irreparable injury will be suffered by the opposite party, deny the application; the right to a continuance of the action is not of so absolute a nature as to preclude the court, in the exercise of a legal discretion, from denying it.

It seems that where a cause of action survives, the plaintiff upon the death of a defendant may be entitled to a continuance under said provision, although the circumstances do not bring the case within any of the pro-

111 350
114 608

111 350
115 496

111 350
117 647

111 350
137 500

111 850
157 108

Statement of case.

visions subsequent to the one above referred to (§§ 757, 758, 759), unless *laches* is a sufficient answer to his motion.

This action was commenced in 1877 to recover damages for alleged fraud and conspiracy. In 1878, on application of defendants and on the ground that plaintiff was a non-resident, an order was made requiring him to file security for costs within sixty days after service of order, and until this was done, staying all proceedings on his part, except to move to vacate the order. The order was duly served but plaintiff did not comply therewith. Defendant P. died in 1882 and defendant B. in 1884. In June, 1886, the plaintiff moved to revive and continue the action against the personal representatives of said defendants and to be relieved from his default and failure to file a bond. It was shown in opposition that said defendants were material witnesses for the defense, and that numerous other important witnesses had died since the stay of proceedings, by reason of which the defense would be greatly prejudiced. *Held*, that the motion was properly denied for *laches*.

B. was at his death a resident of the state of Vermont. Letters of administration on his estate were issued in that state, but no letters ancillary or original have been issued in this state. *Held*, that, conceding the provision of said Code (§ 757), requiring the court on motion to allow or compel an action to be continued in case of the death of a sole plaintiff or sole defendant, precluded the court from denying such a motion (as to which, *quære*), it had no application here, as defendant P. was not sole defendant, and B., who upon the death of P. became sole defendant, was alone within that provision, and over his administrator the court had no jurisdiction.

(Submitted October 16, 1888; decided November 27, 1888.)

APPEAL from order of the General Term of the Superior Court of the city of New York, made December 12, 1887, which affirmed an order of Special Term denying a motion on the part of plaintiff, the nature of which, as well as the material facts, are stated in the opinion. (Reported below, 23 J. & S. 539.)

Ewing & Southard, O. W. Campbell and V. Wright Kingsley for appellant. This action is continued by force and effect of section 755 of the Code of Civil Procedure, which says: "An action does not abate by any event if the cause of action survives or continues." (R. S., part 3, chap. 8, title 3, art. 1, §§ 1 and 2; 3 R. S. [Banks' Bros. 7th ed.] 2394; *Bond v. Smith*, 4 Hun, 48; 35 N. Y. Supr. Ct. 196; 19 N. Y. 464; 27 id. 633; 75 id. 192; *Randall v. Sackett*, 77 id. 480; *Jarvis v.*

Statement of case.

Felds, 14 Abb. 46; *Risley v. Brown*, 67 N. Y. 160; *Haruck v. Crayhead*, Id. 432; *Heinmiller v. Gray*, 35 Supr. Ct. 196; *People v. Starkweather*, 40 id. 453.) If section 755 is insufficient, authority to the court to proceed with this action is found in sections 757 or 762, and under 2 Revised Statutes 386, 477, sections 1 and 2. (*Holmes v. Cooley*, 31 N. Y. 289; *Chase v. N. Y. C. R. R. Co.*, 26 id. 523.) The claim of defendants' counsel that section 757 only gives relief where there is a sole plaintiff or sole defendant, is untenable. (*Coit v. Campbell*, 82 N. Y. 516; *Greene v. Martine*, 84 id. 648; *Holsman v. St. John*, 90 id. 465.) A mere nominal party not served, and over whom the court has not judicial control, is not a party to an action, and hence section 758 of the Code is inapplicable to this case. (*East River Bk. v. Cutting*, 1 Bosw. 636; *Wood v. Fingernail*, 1 Robt. [Sup. Ct. Rep.] 487.) The power of the court to proceed with this action is expressly given in Revised Statutes, part 3, chapter 8, title 3, section 1 (Banks' 7th ed.) 2394. (*People v. Starkweather*, 40 N. Y. Supr. Ct. 460.) The court has no discretion to refuse the order to bring in the representatives of deceased defendants. (*Coit v. Campbell*, 82 N. Y. 509; *Greene v. Martine*, 84 id. 648; *Holsman v. St. John*, 90 id. 461; *Evans v. Cleveland*, 72 id. 486.) Under the law this action continues to be maintainable against the successors of Park & Baxter by section 757 of the Code (19 N. Y. 471; 25 How. Pr. 286.) If an action at law is commenced before the statute of limitations runs, there can be no laches interposed thereafter as a defense, and that is this case. (*Evans v. Campbell*, 72 N. Y. 436; *Coit v. Campbell* 82 id. 510; *Holsman v. St. John*, 90 id. 136; *Greene v. Martine*, 21 Hun, 136.) The mere default of plaintiff in giving the bond for costs under the former order of the court does not take away the imperative character of the motion, or otherwise prejudicially affect this application for continuance..

Joseph H. Choate and *Frederic B. Jennings* for respondents. The order was one resting in discretion and cannot be reviewed here unless the court shall hold that the court below was bound

Statement of case.

to grant the motion, and had no discretion whatever in the matter. (Civil Code, § 190, subd. 2; *Getty v. Spaulding*, 58 N. Y. 636; *Cushman v. Brundett*, 50 id. 296; *Medbury v. Swan*, 46 id. 203; *Thorington v. Merick*, 101 id. 9; *Coit v. Campbell*, 82 id. 517.) The very fact that the Code requires an application to the court for leave to revive and continue the action, and does not permit it to be done, as a matter of course, by simply filing a supplemental complaint or entering a formal order without notice, further sustains the view that discretion, as to granting the order, is reposed in the judge. (*Medbury v. Swan*, 46 N. Y. 202.) The court below could, in its discretion, deny the motion. (*Beach v. Reynolds*, 53 N. Y. 3; *Evans v. Cleveland*, 72 id. 488; *Getty v. Spaulding*, 58 id. 636.) The plaintiff having wholly failed to comply with the positive order of the court to file security within sixty days, no longer has any standing in court, and, if the cause was revived, the defendants would be entitled to judgment dismissing the complaint. (Code of Civ. Pro. § 3277; *Hinds v. Woodbury*, 29 How. Pr. 381; *Lewis v. Lewis*, 13 Abb. N. C. 182, note.) If the action should be revived, the complaint would be dismissed for the plaintiff's unreasonable neglect to proceed in the action. (Code, § 822; *Ellsworth v. Brown*, 16 Hun, 1; *James v. Shen*, 28 id. 76.) The representatives of Park and Baxter could not have revived the suit even for the purpose of moving for judgment under section 3277 or of obtaining a dismissal of the complaint under section 822, to which they were entitled, as before shown. Nor could it be revived by the plaintiff. (*Beach v. Reynolds*, 53 N. Y. 8; *Livermore v. Bainbridge*, 49 id. 127; *Coit v. Campbell*, 82 id. 516.) If Baxter can be treated as a sole defendant after the death of Park, the case cannot be revived against his representatives for the reason that their appointment is shown by the moving papers to have been made in Vermont. That appointment has no extra territorial efficacy: (Schouler on Exrs. § 173 and note 5; Story on Conflict of Laws, § 513, note 3, 657.)

Opinion of the Court, per ANDREWS, J.

ANDREWS J. The plaintiff, in August, 1886, made this motion to revive and continue the action against the representatives of the estate of the original defendants Park and Baxter, both of whom have died since its commencement, and also to be released from his default and failure to file a bond as security for costs, as required by order of the court made June 11, 1878, and that he be permitted to comply with that order. The motion was denied by the Special Term as to the representatives of Park, for *laches*, and dismissed as to the representatives of Baxter on the ground that no administration had ever been granted on his estate in this state. The General Term affirmed the order of the Special Term and the plaintiff appeals to this court. The action was commenced by the service of a summons on Park and Baxter in June, 1877. One Stewart was named therein as a co-defendant, but was never served with process and has not appeared in the action. The complaint sets out a cause of action for fraud and conspiracy, by means of which, as is alleged, the defendants induced the plaintiff, in 1871, to transfer to the defendant Park, for the benefit of himself and his co-defendants, a valuable contract entered into between the plaintiff and the "Emma Silver Mining Company," by which, in a certain contingency, the plaintiff was to have a large interest in the proceeds of the sale of the stock of the company. The order of June 11, 1878, was made on the application of Park and Baxter, on the ground that the plaintiff was a non-resident of this state, and the order required him to file a bond in the penalty of \$2,000, with sureties, within sixty days after service of a copy of the order, as security for costs, to the defendants, Park and Baxter, and meanwhile stayed all proceedings on his part in the action, except to move to vacate the order, until the bond should be given and the sureties, if excepted to, should justify. The order was duly served on the same day, and was the last proceeding in the action until the making of this motion June 22, 1886. The plaintiff has never complied with the order. Park died December 13, 1882, and Baxter, February 17, 1884. Ancillary letters of administration on the estate of Park were

Opinion of the Court, per ANDREWS, J.

granted in this state January 12, 1883. Baxter, at his death, was a resident of Vermont, and administration on his estate was granted in that state February 22, 1884, but no letters, ancillary or original, have been issued in this state. It was shown in opposition to the motion that the defendants, Park and Baxter, were material witnesses, and that numerous other important witnesses for the defense have died since the commencement of the action and during the stay of proceedings, by reason of which a defense of the action at this time is greatly prejudiced.

There can be no doubt that the motion was properly dismissed as to the representatives of the defendant Baxter. The remedy against a foreign administrator, in his representative character, to charge the assets of his intestate for a debt or liability of the decedent, is governed by the law of the jurisdiction where he was appointed, and must be pursued in the legal tribunals of the state or county where the decedent resided at the time of his death, and where administration was granted. (Story's Con. of Laws, § 513; Schouler on Exrs. § 173; *Petersen v. Chemical Bank*, 32 N. Y. 21; *Hedenberg v. Hedenberg*, 46 Conn. 30.) Whatever qualifications to this rule may exist, they proceed upon special reasons, and are not material to the present controversy. The question is, therefore, narrowed to the alleged right of the plaintiff to a revivor or continuance against the representatives of Park.

It is conceded that the cause of action survived the death of Park and Baxter. The authorities on this point are conclusive. (*Haight v. Hayt*, 19 N. Y. 464; *Union Bank v. Mott*, 27 id. 633; *Brackett v. Griswold*, 103 id. 428.) The action, therefore, did not abate on their death. (Code, § 755.) But their death rendered it necessary that the plaintiff should apply to the court for an order to continue the action against their representatives if he desired to proceed. If but one of the defendants had died, their liability being both joint and several, the plaintiff could have proceeded against the survivor without bringing in the representatives of the deceased co-defendant. It is claimed on behalf of the

Opinion of the Court, per ANDREWS, J.

plaintiff, that by force of section 755 of the Code, he has an absolute right to an order continuing the action against the representatives of Park, and that no delay on his part in making the application is a defense to the motion. It is further claimed that the case is within section 757, which in terms is mandatory and requires the court on motion to allow or compel an action to be continued in case of the death of a sole plaintiff or sole defendant. This section was considered in *Coit v. Campbell* (82 N. Y. 517), and although the case was decided on another ground, the learned judge who wrote in that case was of opinion that the mandatory language of the section related to the mode of relief, and that it did not preclude the court in an equity case from denying an application made under that section, upon grounds which, according to the rules of courts of equity, would have constituted a good defense to a bill of revivor. But whatever may be the true construction of that section, it has no application here. The defendant Park was not a sole defendant. He died before Baxter, and Baxter then became sole defendant, and his representatives were alone within the provisions of section 757. (*Coit v. Campbell*.) Nor do the subsequent sections have any application. The first clause of section 758 expresses what probably, without any affirmative enactment, would be the rule, and the second clause relates to actions on contracts exclusively. Section 759 seems to relate to equitable actions, and was designed to put into statutory form the rule declared by the chancellor in *Leggett v. Dubois*, (2 Paige, 211); *White v. Buloid* (Id. 475; and *Hoffman v. Tredwell* (6 id. 308). But we do not think that the right of a party to the continuance of an action, by or against the representatives of a deceased party, where the cause of action survives, depends upon the existence of the precise circumstances stated in section 757 or the following sections. The paramount rule is declared in section 755, that an action does not abate, by any event, if the cause of action survives or continues. The subsequent sections seem to have been enacted to provide for special cases and not to limit to those cases only the power of the court to continue an

Opinion of the Court, per ANDREWS, J.

action. It had been held that on the death of a sole defendant, before any interest had accrued to him, the action could only be continued at the option of the plaintiff. (*Keene v. La Farge*, 1 Bosw. 671; *Souillard v. Dias*, 9 Paige, 393.) Section 757 prescribes a uniform rule on the subject applicable to both parties. Section 758 is supposed to have made a radical change in the rule theretofore adopted in respect to the survivability of a cause of action on a joint contract, in case of the death of one of the joint contractors, who was a surety. (*Randall v. Sackett*, 77 N. Y. 480.) The purpose of section 759 has been adverted to. In our opinion the plaintiff was entitled to a continuance, although the circumstances do not bring the case within any of the sections following section 755, unless his *laches* is a sufficient answer to his motion.

It was decided in *Evans v. Cleveland* (72 N. Y. 486), that the statute of limitations was not a defense to a legal action which the court had permitted to be revived on a supplemental complaint, after the death of the original plaintiff, unless the cause of action was barred when the action was commenced, however long the delay between the death of the plaintiff and the application for a continuance. In equitable actions, according to the opinion of the learned judge who wrote in *Coit v. Campbell*, the rule which prevailed on bills of revivor, which denied relief when the bill was not filed until a period had elapsed after the appointment of an administrator or representative of the decedent, equal to the period of legal limitation of actions, should be followed and applied. But it has never been held in this court that an unexplained or inexcusable neglect to proceed for a long period, during which the other party has lost his means of defense, may not be a sufficient ground for denying a continuance. By section 755 an action in no case abates by the death of a party, where the cause of action survives, but, as an application to the court is necessary to authorize its revival or continuance, the court, we think, may, on the ground of inexcusable *laches*, or where, otherwise, irreparable injury will be suffered, deny the application. Legal rights are frequently lost by *laches* where no question of the statute of lim-

Opinion of the Court, per ANDREWS, J.

itations is involved; and we think the right to a continuance of an action on the death of a party, where the cause of action survives, is not of so absolute a character as to preclude the court, in the exercise of a legal discretion, having regard to all the circumstances, from denying a continuance. The power of the court to deny the application where the "delay has been unreasonable and, in any way, damaging to the defendant," was expressly recognized in *Evans v. Cleveland*. The primary duty to move to continue the action rested on the plaintiff. Assuming that the defendant might have compelled a revivor by the plaintiff, or, in the alternative, an abandonment of the action, this does not excuse the *laches* of the plaintiff. Section 761 only applies in case of the death or marriage of a plaintiff, and, in that case, authorizes the adverse party to apply for an order that the action abate unless continued by the proper parties within a specified time.

We think the motion was properly denied in this case. The action was not brought originally until the statute had nearly run. The order to file security for costs was made and served eight years before this motion was noticed, and has never been complied with. Park died three and a half years before the motion was made, and administrators of his estate were appointed in January, 1883. The plaintiff apparently waited until the parties and witnesses against him were dead before attempting to proceed with the action. His failure to file the bond would entitle the representatives of Park to apply for a dismissal of the action. (Code, § 3227.) The permission to file security at this time was made an essential part of the motion, and the court might properly deny the motion for this relief, and this alone would justify the denial of the whole motion.

The order should be affirmed.

All concur.

Order affirmed.

Statement of case.

THE PEOPLE ex rel. GEORGE KEMP, Appellant, v. ALBERT F.
D'OENCH as Superintendent, etc., Respondent.

111 859
149 201

The act of 1885 (Chap. 454, Laws of 1885), which provides that the "height of all dwelling-houses and of all houses used, or intended to be used as dwellings for more than one family, thereafter to be erected in the city of New York, * * * shall not exceed * * * eighty feet upon all streets and avenues exceeding sixty feet in width," does not apply to hotels, but is mainly applicable to tenement and apartment houses.

It seems that the legislature, in the exercise of the police power under the Constitution, had power to pass such an act.

Where an application to the superintendent of buildings in said city to approve the plans and specifications for an addition to a hotel was denied because the height of the proposed structure was over eighty feet, *held*, a *mandamus* was proper to compel such approval.

(Argued October 16, 1888; decided November 27, 1888.)

APPEAL from order of the General Term of the Court of Common Pleas for the city of New York, made May 15, 1888, which affirmed an order of Special Term denying an application for a peremptory writ of *mandamus* requiring the superintendent of buildings of said city to approve the specifications and plans for a proposed addition to the Buckingham hotel in said city.

The relator's application for such approval was denied upon the ground that the proposed structure was more than eighty feet in height, and so was prohibited by the act. (Chap. 454, Laws of 1885.)

Francis Lynde Stetson for appellant. The act chapter 454 of the Laws of 1885, in so far as it undertakes, without compensation, to absolutely destroy an ancient and well recognized right of property, is unconstitutional. (*Kelsey v. King*, 33 How. Pr. 39-43; *Commonwealth v. Alger*, 7 Cush. 53, 84; *Vanderbilt v. Adams*, 7 Cow. 349; *Wynehamer v. People*, 13 N. Y. 378.) The constitutionality of the act can be affirmed only upon the theory that it is an exercise of the police power. (*People ex rel. v. Squires*, 107 N. Y. 239; *In re Jacobs*, 98 id. 98; *In re Otis*, 90 id. 52.) This police power, though indefinite, is not without limitation.

Statement of case.

(Tiedman's Treatise, 439.) It is not possible to justify such a destruction of property as is contemplated by the act of 1885, for the benefit of adjoining lands, either public or private. (*In re Cheesebrough*, 78 N. Y. 232.) If constitutional, the statute, being in derogation of common right, must be strictly construed. (*Millerd v. R. R. Co.*, 9 How. Pr. 238-240; *Wash. Cemetery v. P. P. & C. I. R. R. Co.*, 68 N. Y. 591-594; *Vestry Chelsea v. King*, 17 C. B. [N. S.] 629; *Burnside v. Whitney*, 21 N. Y. 149; *Potter's Dwarria*, 240; *Van Horne v. Dorrance*, 2 Dall. 304, 316; *Hart v. Cleis*, 8 Johns. 43; Pomeroy's note to Sedgwick on Statutory Construction [2d ed.] 271.) The legislature did not intend to include within the operation of this act of June 9, 1885, any buildings other than "dwelling-houses," according to the meaning of that term as theretofore used in the building laws relating to New York city; and, as thus employed, the term "dwelling-house," did not include building erected specifically and exclusively for use as a "hotel." (*In re Paul*, 94 N. Y. 497; Laws 1815, chap. 155; Laws 1823, chap. 122; Laws 1830, chap. 291; Laws 1831, chap. 212; Laws 1833, chap. 307; Laws 1834, chap. 156, 220; Laws 1849, chap. 84; Laws 1850, chap. 120; Laws 1851, chap. 66; Laws 1856, chap. 188; Laws 1862, chap. 356; Laws 1866, chap. 873; Laws 1867, chap. 939; Laws 1871, chap. 625; act of 1882, chap. 410, §§ 476, 477, 499, 502; Laws 1887, chap. 566, §§ 5, 26.) While it is true that for some purposes and in some statutes the term "dwelling-house" includes a "hotel," such not being the invariable meaning of the word, it is not so to be construed here to the impairment of relator's right. (*State v. Troth*, 36 N. J. Law, 422; *Fire Department v. Buhler*, 1 Daly, 391, 35 N. Y. 177; 9 How. Pr. 238-240.) Without compensation this property right cannot be diminished merely for the good of adjoining property. (78 N. Y. 232.)

William L. Findley for respondent. The term dwelling-house, in its usual and ordinary acceptance, includes a hotel.

Opinion of the Court, per EARL, J.

(Worcester's Dict. ; Penal Code, §§ 492, 502 ; *Fire Dept. v. Buhler*, 1 Daly, 391 ; Laws of 1887, chap. 566, § 5 ; *State v. Troth*, 36 N. J. L. 422.) Both the natural signification of the words used, and the reason for the law itself, call for a construction broad enough to include an "hotel" as among the inhabited buildings. (*Hudson Iron Co. v. Alger*, 54 N. Y. 173-175 ; *Fire Dept. v. Buhler*, 35 id. 181.) The act, being a police regulation, is within the constitutional powers and prerogatives of the legislature. (*Met. Board of Health v. Heiser*, 37 N. Y. 668 ; *Health Dept. v. Knoll*, 70 id. 530 ; *Powell v. Com. of Patents*, 27 U. S. 678.)

EARL, J. It is provided in the act chapter 454 of the Laws of 1885 that "the height of all dwelling houses and of all houses used or intended to be used as dwellings for more than one family" thereafter to be erected in the city of New York shall not exceed eighty feet in streets and avenues exceeding sixty feet in width.

We have no doubt of the competency of the legislature in the exercise of the police power under the Constitution to pass such an act, and the sole question, therefore, now to be determined is whether the act applies to hotels. We think it does not. In interpreting statutes the words used should receive their ordinary and popular import ; and, according to general usage, a dwelling-house is not a hotel and a hotel is not a dwelling-house. Sometimes it may be that the word "dwelling-house" should, for the purpose of giving the statute its intended effect, and operation embrace hotels. But such an unusual and extended meaning should not be given to the word unless it can be plainly seen that such was the legislative intention. Here we have no reason to suppose that the legislature intended the act should apply to hotels. As simple, private dwelling-houses are rarely, if ever, built eighty feet high, the main purpose of the act must have been to regulate the height of tenement and apartment houses, which are becoming very numerous in New York, which are usually built in the midst

Statement of case.

of dwelling-houses and in which several families live and carry on all the operations of housekeeping. There is not the same reason for regulating the height of hotels not usually built in the midst of dwelling-houses, which are mainly occupied by temporary adult guests, which are under the supervision of one management and which can never become very numerous. While stores, factories, warehouses, buildings for offices and numerous other buildings may be erected without any restriction as to height we can see no reason to suppose that the language used in this act was meant to embrace hotels, nearly all of which in the city of New York have for many years been erected of greater height than the limit prescribed in the act.

The orders of the Special and General Terms should, therefore, be reversed, and a peremptory writ of *mandamus* issued without costs.

All concur.

Ordered accordingly.

111	362
115	302
111	362
131	482

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
VIRGIL JACKSON, Appellant.

111	362
172	205

It seems the granting or refusal of a motion to postpone the trial of a criminal action is in the discretion of the court, and its decision thereon, where there is no abuse of discretion, is not reviewable upon appeal.

Where such an application is based upon the ground of the absence of a witness, it must appear to the court, *first*, that the witness is really material; *second*, that the party applying has been guilty of no neglect; *third*, that the witness can be had at the time to which the trial is deferred

The trial of an indictment for murder having been set down for a particular day the court ordered an adjourned term to be held on that day, and directed a specified number of trial jurors to be summoned to attend. These were drawn and summoned in the usual manner, and the court, because of their service during the four weeks session preceding, discharged the original panel from further attendance. *Held*, that this furnished no ground for a challenge "to the array and the panel of jurors:" that it was within the power of the court to excuse one or all of the jurors originally summoned and to summon any number of others it

Statement of case.

deemed necessary. (Code Crim. Pro. §§ 358, 361; Code Civil Pro. §§ 34, 1033, 1058.)

It seems that if the dismissal of the regular panel was erroneous, this was not a ground for a challenge to the panel. (Code Crim. Pro. § 361.)

A variance between the averment in such an indictment and the proof as to the day on which the crime was committed, is immaterial and may be disregarded, or the indictment may be amended. (Code Crim. Pro. §§ 293, 294, 295.) It is sufficient that the crime was committed at some time prior to the finding of the indictment and that it can be so understood from its allegations. (Code Crim. Pro. §§ 280, 284.)

With the consent of defendant, a photograph representing the place where the homicide was committed, was put in evidence. W., a witness for the prosecution, who was present when the photograph was taken and who had seen part of the affair from a window near by, placed three persons in the highway to represent the positions, which, according to his recollection the deceased, the defendant and another person present at the homicide occupied. W.'s testimony as to that fact was received under objection and exception. *Held*, no error

Defendant's counsel, under an offer to show that he carried the revolver with which the crime was committed to protect himself from a threatened assault by one W., offered proof of threats made by W. against defendant; there was no suggestion that these threats had come to defendant's knowledge. *Held*, that the offer was properly rejected.

(Argued October 12, 1888; decided November 27, 1888.)

APPEAL from judgment of the Court of Oyer and Terminer of the county of Oneida, entered April 20, 1888, upon a verdict convicting the defendant of the crime of murder in the first degree.

The facts, so far as material, are stated in the opinion.

A. D. Kneeland for appellant. The court erred in granting the application for an order of continuance under the circumstances. (1 Burr. 510, 511; 1 Chit. on Crim. Law, 492; *Ogden v. Payne*, 5 Cow. 15; *Hooker v. Rodgers*, 6 id. 15; *People v. Vermilyea*, 7 id. 368; *People v. Horton*, 4 Park. Cr. 222; 1 Colby's Crim. Law, 308-310; *Comm. v. Knapp*, 9 Pick. 496; 66 Cow. 577.) It was error to discharge the regular panel of jurors, because of four weeks service, and make the additional panel a sole and separate panel, and the trial judge erred in overruling the challenge to the array and

Statement of case.

panel of jurors. (*People v. Mallan*, 3 Lans. 224; *People v. Cummings*, 3 Park. 343.) The jury was not properly constituted. (Code of Crim. Pro. subd. 1, §§ 359, 361, 362; *People v. McCloskey*, 5 Park. 308; *People v. Cox*, 80 N. Y. 500; Co. on Litt. 158 a; 1 Arch. on Crim. Pl. 165, and note; 1 Denio, 281; 4 E. D. Smith's, 142; 1 Abb. 344; Colby's Crim. Law, 332; Laws of 1871, chap. 16, § 1; *Pierson v. People*, 79 N. Y. 428; *People v. Kenny*, 31 id. 330; *People v. Ferris*, 35 id. 129; *People v. Friery*, 2 Keyes, 424; *People v. Colt*, 3 Hill, 432; 1 Park. Cr. 611; 3 id. 343; 3 Lans. 224; Code, § 1171; 5 Park. Cr. 308; 53 N. Y. 165; 37 id. 405; 3 Hill, 194; 54 N. Y. 334; 1 id. 519; 2 Johns. 260; 25 Barb. 29; 4 Denio, 10; 3 Hun, 477; 96 N. Y. 116; 76 id. 279-283.) Under the variance in the indictment and the proof in regard to time, conviction was erroneous. (1 Bish. on Crim. Pro. §§ 386, 389; 4 N. Y. Crim. Rep. 547, 593; Code of Crim. Pro. § 280.) It was error in the trial judge to admit the evidence of the witness Wasmuth that he had placed persons, previous to the taking of the photographs, to occupy the positions claimed to have been occupied by the deceased, his wife and the defendant, during the struggle. (*People v. Ruloff*, 45 N. Y. 213; *Haynes v. McDermott*, 82 id. 42; *People v. Cowley*, 83 id. 465; 76 Penn. St. 340; 1 Abb. Ct. App. 453; 53 N. Y. 165; 2 id. 514; 20 Hun, 156, 166; 95 N. Y. 252, 316; 98 id. 56.) If the evidence falls within the range of ordinary intelligence, then it was not the subject of expert testimony. (96 N. Y. 408.) No evidence could be given merely for the purpose of establishing a tendency, on the part of the accused, of perpetrating a similar offense, or to show motive or intent, nor was it pertinent to the issues. It tended to degrade the witness, and he was privileged from answering. (24 N. Y. 298; 72 id. 571; 37 id. 309, 310; 76 id. 291; 56 id. 363; 87 id. 63; 53 id. 165; 93 id. 470; 94 id. 144; 1 Greenl. on Ev. 457; 107 N. Y. 427; 55 id. 81; 56 id. 591; 104 id. 481.) Specific acts cannot be shown. General bad character only is provable. (1 N. Y. 519; 58 id. 561; 4 Seld. 521; 95 id. 252; 47 id. 187; 98 id. 57; 54

Statement of case.

id.* 334; 18 id. 546.) It was error in the trial judge to exclude the evidence, offered in the defendant's behalf, tending to show that one Wing had had trouble with the defendant, and had made threats upon Jackson's life, and that the defendant had armed himself through fear of Wing's threatened assaults. (36 N. Y. 431; 2 Colby's Crim. Law, 183, 194, § 8; 38 N. Y. 281; 44 id. 22; 14 id. 567; 66 id. 221; 2 Colby's Crim. Law, 187, 199, § 16; 96 N. Y. 340; 31 id. 330; 3 Wait's L. and P. [5th ed.], Presumptions, 427; 1 Greenl. on Ev., part 1, chap. 4, § 34; 65 N. Y. 322.) Premeditation and deliberation must both be proven. (88 N. Y. 117.) Neither of them can be deduced merely from the fact of homicide. (49 N. Y. 137; 53 id. 155; 106 id. 303.)

Thomas S. Jones for respondent. The weapon was selected and the shots discharged, with a palpable design to effect death; no other inference is reasonable. (*People v. Beckwith*, 103 N. Y. 366.) A rational agent must be taken to contemplate and intend the natural and immediate consequences of his own act. (*Foster v. People*, 50 N. Y. 609; *People v. Conroy*, 97 id. 77, 78.) While there must be deliberation and premeditation to constitute murder in the first degree, there is no time prescribed within which these operations of the mind must occur; it is sufficient if their exercise was accomplished and the deed was done, resulting in death. (*People v. Hawkins*, 109 N. Y. 411, 412; *Leighton v. People*, 88 id. 117-120; *People v. Beckwith*, 103 id. 178; *People v. Clark*, 7 id. 385.) To constitute murder in the first degree, a design to kill must precede the killing, but when the time is sufficient, it matters not how brief. (*People v. Majone*, 91 N. Y. 211; *People v. Keirnan*, 4 N. Y. Crim. Rep. 88, 91-93; *People v. Conroy*, 97 id. 62, 78, 79; *People v. Beckwith*, 103 id. 366-368; *Fiery v. People*, 2 Abb. Ct. App. Dec. 219; *People v. Jones*, 99 N. Y. 667, 668.) The killing was not in self-defense. The jury was authorized, in view of contradictions and interest, to discredit the whole or part of defendant's story, and rely on the proof of circumstances.

Statement of case.

and eye-witnesses. (1 Greenl. on Ev. § 218; *People v. Beckwith*, 103 N. Y. 368.) Defendant did not attempt to escape or avoid attack, as he should have done. (*People v. Sullivan*, 7 N. Y. 396; *People v. Cole*, 4 Park. 35; *Shorten v. People*, 2 N. Y. 193-203; *People v. Beckwith*, 103 id. 366; Whart. on Crim. Ev. [9th ed.] § 69.) The jury had the right to consider this admission to call Mrs. Metcalf in determining the truth of defendant's story. (*Wyle v. N. R. R. Co.*, 53 N. Y. 156.) The contradictory statements made to Francisco and Munger, as compared with defendant's testimony, afford evidence of evil intent. (*People v. Conroy*, 97 N. Y. 80, 81.) The dismissal of the regular panel at the end of four weeks session of circuit, April seventh, was not ground of challenge to panel of jury. (Code of Crim. Pro. § 362; Code of Civ. Pro. §§ 34, 3350.) The rulings on challenges for principal cause and implied bias were right, but, as the defendant obtained a jury without having exhausted his peremptory challenges, an erroneous ruling in that behalf would not have injured defendant. (*People v. Carpenter*, 102 N. Y. 239-243.) The objections to evidence, and motion to discharge the prisoner because the indictment charged the crime to have been committed January 30, 1888, instead of January 29, 1888, were properly disposed of. (Code Crim. Pro., §§ 293-295; *People v. Johnson*, 104 N. Y. 213.) The defendant was not entitled to give declarations in his own behalf, after the commission of the crime. (*People v. Real*, 42 N. Y. 275, 279, 282.) The charge was correct as to deliberation and premeditation. (*People v. Conroy*, 97 N. Y. 78; *People v. Beckwith*, 103 id. 368; *People v. Majone*, 91 id. 211; *People v. Dimick*, 107 id. 13.) The judge correctly charged that the inference is if a man points a loaded revolver at the vital part of another, and fires a ball into him, knowing what he was doing, he intended to effect death. (*People v. Beckwith*, 103 N. Y. 366; *People v. Rogers*, 13 Abb. [N. S.] 376; *People v. Conroy*, 97 N. Y. 77.) A single phrase in a charge in a criminal action, isolated from the rest, if found to be erroneous, will not be ground for reversal, if the whole charge

Opinion of the Court, per DANFORTH, J.

properly instructs the jury, and it can be seen that the erroneous portion did not mislead the jury or influence the verdict. (*People v. Dimick*, 107 N. Y. 13-26.)

DANFORTH, J. The matters to be determined relate to the rulings of the court upon questions raised by defendant's counsel before the commencement of the trial and during its progress. The first was on an application to the court, made March 19th, for a postponement of the trial to the November term. It was refused. The court had power to grant the application, but the affidavits presented, apart from the absence of the witness, showed nothing more than that the private and personal convenience of the defendant or his counsel would be promoted by the delay asked, and the judge might well conclude that a failure to proceed would be inconsistent with the due course of public justice. So far as the application depended on the absence of a witness, the case of *King v. D'Eon* (1 W. Black. 510), is in point. Upon a like application Lord MANSFIELD said, "to put off a trial it must appear (1) that the witness is really material and appears to the court to be so; (2) that the party who applies has been guilty of no neglect; (3) that the witness can be had at the time to which the trial is deferred;" and I believe that nothing less than these concurring facts has at any time been held to be sufficient. In the case before us the prisoner met none of the conditions. His affidavit only averred "that there are two witnesses, ladies by the name of Harrington, who are material witnesses for deponent, without the benefit of whose testimony deponent cannot safely proceed to the trial of said indictment, as he is advised by his said counsel, after fully and fairly stating to him what he expects to prove by said witnesses, and as deponent verily believes. That neither their names or addresses or residences can be learned, and he cannot procure their attendance at this term of court."

The affidavit of his attorney is, "that deponent was informed by several persons, and among others, witnesses who were sworn before the grand jury, that there was and is a person

Opinion of the Court, per DANFORTH, J.

who was an eye-witness to the transaction or alleged crime with which defendant stands charged, who ran away as soon as the shooting concluded, whose name is unknown, and whose residence is unknown, and who has not divulged his secret, so that either what he saw, his name or residence, can be learned ; that such is the current rumor about the village where the alleged murder occurred," adding that in his opinion the "evidence of such witness is very material and essential to the defendant."

The question as presented hardly calls for the exercise of any legal discretion. It seems destitute of merit and not the proper subject of review upon appeal, but in view of the importance of the case we have considered it. The trial judge did not err in its decision.

Second. It is claimed that "the trial judge erred in overruling the challenge to the array and panel of jurors."

It was alleged that the offense charged upon the defendant was committed in the town of Augusta, Oneida county, on the 30th of January, 1888. He was at once arrested and at the Oneida Oyer and Terminer, commencing March 12, 1888, indicted for murder. He was arraigned on the fifteenth of March. He plead not guilty, and his motion to postpone being denied, the trial was set down for April ninth. The court ordered an adjourned term of the Oyer and Terminer to be held on that day and directed one hundred and twenty-five trial jurors to be summoned to attend at that time. These were drawn and summoned in the usual manner, and the court, because of their service, discharged from further attendance all jurors of the original panel who had attended and served during the four weeks session of the court. The district attorney moved the trial of the defendant, and his counsel "objected to and challenged the array and the panel of jurors," upon various grounds, all of which, however, save one were afterwards abandoned, the prisoner's counsel stating "that his challenge was directed to and intended to raise the question as to the legality of the discharge by the court of the jury originally summoned for the Circuit and Oyer and Ter-

Opinion of the Court, per DANFORTH, J.

miner, and which, it was admitted in open court, were, after a four weeks session and service, discharged for the term and this present panel summoned in its stead."

The Code of Criminal Procedure permits a challenge to the panel (§ 361), but provides that "it can be founded only on a material departure, to the prejudice of the defendant, from the forms prescribed by the Code of Civil Procedure, *in respect to the drawing and return of the jury*, or on an *intentional* omission of the sheriff to summon one or more of the jurors drawn."

The objection now relied upon indicates no error. The dismissal of the regular panel, if erroneous, is not within the section cited. That, by explicit language, is confined to acts of omission from a prescribed procedure. In the Oyer and Terminer the trial jury is formed as prescribed in the Code of Civil Procedure (Code of Crim. Pro. § 358), and for that court, whether held by original appointment or by adjournment, any number of trial jurors may be summoned by direction of the court and whensoever it deems necessary. (Code of Civil Pro. §§ 34, 1058.) So, also, in the discretion of the court, a juror may be excused, and as one may be, so may all. (§ 1033.) Continued service by a juror for four weeks might reasonably lead the trial court to the conclusion that public interest, as well as that of the juror, required a change or permitted his relief.

Third. The indictment charged that the crime was committed on the thirtieth day of January; the evidence showed that it was, in fact, committed on the twenty-ninth of January. The variance was unimportant and properly disregarded. It is enough that the crime was committed at some time prior to the finding of the indictment, and that it could be so understood from its allegations. (Code of Crim. Pro. §§ 280, 284, sub. 3.) The indictment might, indeed, have been amended (Code of Crim. Pro. §§ 293, 294, 295), but that was not necessary for the preservation of any right of the defendant.

Fourth. That the court erred in the admission of evidence:

SICKELS—VOL. LXVI. 47

Opinion of the Court, per DANFORTH, J.

(1.) A photograph had been put in evidence, not only without objection from the defendant, but with his consent, to show the place where the homicide was committed. It represented a street scene, and among other houses the one occupied by the deceased in his life-time. Wasmuth, whose testimony is hereinafter referred to, from his own window had seen part of the affair and the situation of the parties. He was present when the photograph was taken, and placed three persons in the highway to represent the position which, according to his recollection, they occupied at the time in question. His testimony as to that fact was objected to, and its admission is assigned as error. The arrangement was not exact, but it was matter of description and served to indicate in a general way the impression left upon the mind of the witness. It aided his oral statement and was an essential and proper explanation of the circumstances attending the taking of the picture and of the picture itself.

(2.) The defendant visited the wife of Metcalf the night before the shooting, and remained in her bedroom for several hours; he was there, as on many former occasions he had been, for an illicit purpose, and evidence was given that the overcoat worn that night contained a stocking with a stone in it, described by the defendant as a slung-shot. It is now made a point that the defendant was not permitted to show why he carried it. This, if well founded, might present a serious question, but we have carefully examined the record, especially at the folios referred to by the defendant, and find no evidence of such exclusion.

Fifth. That evidence was improperly excluded.

(1.) The shooting was from a revolver, and the defendant's counsel, in answering the plaintiff's case, said: "I desire to show, if the court please, that Mr. Frederick Wing assaulted the defendant about July last in the saloon of Edward Wasmuth, in the village of Augusta Centre. That there they had a quarrel, Wing and the defendant, and that Wing threatened the defendant's life. I shall produce an array of witnesses to show that Wing threatened the defendant's life,

Opinion of the Court, per DANFORTH, J.

and has, repeatedly, since. That the defendant carried the revolver which he had on his person to guard against a threatened assault by Frederick Wing. As bearing upon the question of premeditation and deliberation in the carrying of this revolver, I desire to show the fact in reference to that assault, and of his threats; to show that one of those threats was made about a week before this homicide. I shall show that he purchased his revolver after that fracas." And the trial judge replied: "I do not think the evidence is admissible at this stage of the case, but I will allow you to proceed for the present on the line of the examination which you offer."

The defendant's counsel thereupon gave evidence by one witness of threats made by Wing to Jackson, and offered another to testify that he had heard from Wing similar threats. This was objected to and excluded. There was no suggestion that they had come to the defendant's knowledge. Without that they were unimportant, for, if not communicated to the defendant, they could have had no influence upon his conduct. It was, no doubt, competent for the defendant to explain the possession and carrying of the revolver, and he was not prevented by the court from doing so. But, although a witness in his own behalf, he gave no explanation of that fact until, on cross-examination, he was asked by the district attorney as to the occasion, and he explained, that a week before the homicide he had taken the revolver from his drawer and put it in the pocket of his "best pants," to take with him to his mill to see if he "could shoot a rat," and on the day in question he put on "the same pants," the revolver still remaining in the pocket. He made no mention of Wing, or apprehension of danger from any source.

Sixth. That there is no evidence of premeditation or deliberation. To us it seems otherwise.* * * * *

A jury might fairly say, not only that the pistol was with him as a mode of preparation, but that in the manner of possessing himself of it when its use was desirable in the perpetration

* The omitted portion of the opinion is taken up with a consideration of the evidence upon the question of deliberation and premeditation.

Statement of case.

of his design, there was manifested such exercise of thought and contrivance as denoted the presence of judgment and reason, rather than the violent and ungovernable passion, either of fear or anger. They have, indeed, said by their verdict that the circumstances of the case and the credible evidence point with irresistible force to a crime committed intentionally and with premeditation and deliberation.

Some other exceptions were taken by the learned counsel for the defendant. They are unimportant. No right of the defendant was prejudiced by any ruling during the trial; we find no misdirection on the part of the judge, nor any reason to doubt that the verdict was reached after a fair and full consideration of the case by the jury. We think that it reflects the very truth of the issue and justice requires that it should be made effective.

The judgment and conviction, therefore, should be affirmed.

All concur, except GRAY, J., not voting.

Judgment affirmed.

In the Matter of the Judicial Settlement of the Accounts of
CHRISTOPHER R. ROBERT, as Executor, etc.

The will of R. gave his residuary estate to five beneficiaries, his four children and a college, in unequal proportions, two children to whom advances had been made prior to the making of any will by the testator receiving less than the others. The will provided that "any moneys or indebtedness" that should appear upon the testator's inventories or books of account charged as "due him from any of said beneficiaries during his lifetime as an outstanding or unsettled account" at the time of his decease should be considered as forming part of his estate, and a discharge thereof by his executors, should be considered as so much payment and should be deducted from the share of such beneficiary, but without interest, unless some obligation "securing such indebtedness" should be found among the testator's assets upon which interest had been paid or charged, in which case it was declared "the said indebtedness shall continue to be charged." It was also declared that any moneys which should appear in his books charged to either of said beneficiaries "to a furniture or allowance account" should not be debited to

Statement of case.

such beneficiary on settlement of the testator's estate, but should be "considered as a gift." *Held*, that the provision directing a deduction for indebtedness contemplated an actual indebtedness which might have been enforced by the testator in his lifetime, and so did not include the advances above mentioned, which were entered in his books and charged to said children as advances, and in his inventories up to the time of the execution of a will as "unavailable assets," although included as part of the estate "for distribution;" it appearing that in subsequent inventories they were not so included.

(Argued October 17, 1888; decided November 27, 1888.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made October 21, 1886, which affirmed a decree of the surrogate of the county of New York on final settlement of the accounts of Christopher R. Robert, as executor of the will of Christopher R. Robert, deceased.

The surrogate charged to and deducted from the share of the testator's son, Frederick Robert, under the residuary clause of the will, \$20,000, and of his daughter Jane R. Corning \$50,000. The said legatees excepted to these charges, and the question on appeal was simply as to the legality of these deductions.

The provisions of the will in question are as follows:

"*Fourthly*. All the rest, residue and remainder of my estate, real and personal, whatsoever or wheresoever, as well that I now have as that which I may hereafter acquire and die possessed of or entitled to (except such as is herein otherwise disposed of) I order and direct my executors hereinafter named, or such of them as shall qualify and act, the survivors and survivor of them, to sell and dispose of, * * * and after disposing of my said real and personal property, and, deducting from the proceeds thereof all necessary expenses and charges, also the thirty thousand dollars bequeathed my wife as before mentioned, to divide the remainder into fifty equal parts; and if my son Christopher R. Robert, Jr., be then living, to pay over to him twelve equal parts thereof, but, in case of his death prior to such distribution, upon such

Statement of case.

distribution to pay over the said twelve parts to his lawful issue in equal portions, share and share alike.

“And if my son Frederick Robert be living at the time of such distribution, to pay over to him eleven of the said equal parts, but, in case of his death prior to such distribution, upon such distribution to pay over the said eleven parts to his lawful issue in equal portions, share and share alike.

“And if my son Howell W. Robert be living at the time of such distribution, to pay over to him twelve of the said equal parts, but, in case of his death prior to such distribution, upon such distribution to pay over the said twelve parts to his lawful issue in equal portions, share and share alike.

“And if my daughter Jane R. Corning be living at the time of such distribution, to pay over to her five of the said equal parts, but, in case of her death prior to such distribution, upon such distribution to pay over the said five parts to her lawful issue in equal portions, share and share alike.

“And upon such division to pay over to ‘the trustees of Robert College of Constantinople’ ten of such equal shares, which with the other bequests herein made to the said trustees of said college are for the endowment fund of the said college, and the money derived from the said bequests is to be invested in bond and mortgage on improved productive real property in, fee simple, in the city of New York or Brooklyn, worth double the amount loaned at a low valuation — the income only to be used for the general uses and purposes of the said college.

“In case the said college shall be discontinued, then I will that the said bequest, as well as any other bequests herein made to the said college shall be applied by the said trustees of said college, in such manner as they may deem best for the general purposes of evangelical and Protestant education among any of the nationalities of the Turkish Empire.

“*Sixthly.* All moneys or indebtedness, which shall appear upon any inventory or ledger or books of account, kept by me, or under my direction, charged as due to me from him, or either of my said children, or Robert College of Constanti-

Statement of case.

nople, during my lifetime, and as an outstanding or unsettled account at the time of my decease, whether with or without security, shall be considered as forming part of my estate mentioned or referred to in the fourth article of this my will, and a discharge from such indebtedness by my executors shall be deemed and taken as an equivalent to an equal amount paid such college, child or children, on account of its, his, her or their share and portion under this my will.

“And my executors are hereby directed to deduct the amount of such indebtedness from such respective share or portion, but no interest is to be charged upon or added to any such indebtedness, except in case a bond, note or other obligation, securing such indebtedness, be found among my assets, upon which said bond, note or obligation interest has been paid or charged, in which case the said indebtedness shall continue to be charged with interest.

“Any items or charges which may appear in any account of my private, personal or family expenses shall not be included or charged as such indebtedness. Nor shall any moneys which shall appear on my books charged to either of my said children to a furniture or allowance account be debited to such child on the settlement of my estate, but the same is considered as a gift made by me to such child during my lifetime.”

The ledger account of Frederick Robert shows a debit January 1, 1876, when the account was closed, of \$20,000. The account commences with an item under date of February 22, 1864, “To cash, \$20,000;” and the entry in the day-book is in the following language:

“Advanced to Frederick Robert, on account of his portion of my estate, in order to enable him to go into business, which is to be charged him on settlement of my estate, but no interest, \$20,000.”

The ledger account of Mrs. Jane R. Corning closes with a balance under date of January 1, 1874, on the debit side, of \$50,000. This account commences with an item, under date of May 6, 1864, “To cash, \$50,000.” The entry on the day book is as follows:

Statement of case.

"Paid John H. Sherwood, for the house and lot No. 8 East Fortieth street, which I have given to my daughter, Mrs. Jane R. Corning, by deed from the said Sherwood, as her separate property, and as a part of her share in my estate. I charge the amount to her, but, though counted as part of my assets, no interest is to be charged thereon."

The claim of the executor was, that a discharge of these items was to be deemed, under the sixth clause of the will, as the payment to Frederick Robert and Jane R. Corning, of so much of their shares in the residuary estate.

Further material facts are stated in the opinion.

Edward C. Perkins for Frederick Robert, appellant. The advance made to this appellant does not come within the plain definition, contained in the sixth clause, of the sums which the testator intended to be deducted by the executors from the residuary bequests. (*Chase v. Ewing*, 51 Barb. 613.) The sixth clause has already been judicially construed by this court in accordance with our contention. (*Robert v. Corning*, 88 N. Y. 225, 241.)

Esek Cowen and *Charles F. Stone* for appellants. An "advancement" in law is an irrevocable gift by a parent who afterwards dies intestate of the whole, or a part of what it is supposed the child will be entitled to, on the death of the party making the advancement. (1 Grant's Cases, part 370.) The amount of \$50,000, being an absolute gift or advancement to Mrs. Corning, as a part of her prospective share of her father's estate, was not a "part" of his estate, to be deducted from her share of the residuum, under the sixth clause of the will. (*Rogers v. Daniels*, 8 Allen, 343.) The language of this testator being, at the least, reasonably capable of a construction, which will not operate to disinherit his only daughter, it follows that her construction is the true one. (*Low v. Harmony*, 72 N. Y. 414; *In re Brown*, 93 id. 300; *Hoyt v. Hoyt*, 85 id. 142, 149.) In the construction of wills, a construction which makes a provision of the will nugatory and ineffectual,

Statement of case.

will not be adopted if it is possible to avoid it. (*McCorn v. McCorn*, 100 N. Y. 513.)

Thomas G. Shearman for Robert College, respondent. The effect of the will is open to modification by entries, in the testator's books, made previously to the date of his will, even though unattested, so long as they are referred to in the will. (*Brown v. Clark*, 77 N. Y. 309; *Haubergham v. Vincent*, 2 Ves. 204, 228; *Smart v. Prujean*, 6 id. 564, 565; *Burton v. Newberry*, L. R., 1 Ch. Div. 234; *Allen v. Maddock*, 11 Moore P. C. 427; *Williams v. Evans*, 1 Crompt. & M. 42; *Tonnelle v. Hall*, 4 N. Y. 145; *Pigot v. Wilder*, 26 Beav. 90; *Aaron v. Aaron*, 3 D. & G. 475; *Chambers v. McDaniel*, 6 Ired. Law, 226; *Johnson v. Clarkson*, 3 Rich. Eq. 305; *Hitchcock v. Wood*, 2 Moore P. C. 355; *Harvey v. Chouteau*, 14 Mo. 587; *Bizzey v. Flight*, L. R., 3 Ch. Div. 269; *In re Mercer*, L. R., 2 P. & M. 91; *Anderson v. Anderson*, L. R., 13 Eq. 381; *Quihampton v. Going*, 24 Week. Rep. 917.) The meaning and intent of the sixth clause in the will was to charge against the shares of the children the precise sums which are now charged by the decree against them. The meaning of the word "indebtedness," as used in the will, is any sum which the testator has chosen to enter upon his books or inventories as in form an indebtedness. (*Chase v. Ewing*, 51 Barb. 613.) The language of a testator is not to be construed with the legal nicety of a statute, or even of a contract between living parties. (*Phillips v. Davies*, 92 N. Y. 199; *Hoppock v. Tucker*, 55 id. 207; *Lytle v. Beveridge*, 58 id. 598.) Where words are unambiguous, they cannot be departed from, merely because they lead to consequences which may be considered capricious or even harsh and unreasonable. (*Abbott v. Middleton*, 7 H. L. C. 89; *Gordan v. Gordan*, L. R., 5 H. L. 254, 284.)

John M. Bowers for C. R. Robert, executor, etc., respondent. If a will incorporates in itself, by reference, a paper in existence at the date of the will, and clearly identified as the

Opinion of the Court, per FINCH, J.

paper referred to, it is to be read as a part of the will. (*Quinhampton v. Going*, Week. Notes for 1876, 209; 29 Week. Rep. 917; *Tonnelle v. Hall*, 4 N. Y. 140; *Lawrence v. Lindsay*, 68 id. 108; *Newton v. Seaman's Friend Society*, 130 Mass. 91; 1 Dem. 306; *Hitchcock v. Wood*, 2 Moore P. C. 355; *Bizzey v. Flight*, L. R., 3 Ch. Div. 269, 273.) The power of the court may be exercised to construe a will; it cannot be exercised to make it anew. (*Wood v. Bishop*, 1 Dem. 518; *Phillips v. Chater*, Id. 535; *Sequine v. Sequine*, 4 Abb. Ct. App. Dec. 191, 194; *Clapp v. Fullerton*, 34 N. Y. 192, 196; *Phillips v. Davies*, 92 id. 199, 204; *Lytle v. Beveridge*, 58 id. 598, 602, 604.) The word indebtedness, so far as the terms of this particular will were concerned, must be construed as synonymous with the word moneys. (*Cudoyan v. Palazi*, 49 Law T. [N. S.] 666; *Tulhum v. Chitty*, 4 Jones' Eq. [N. C.] 244; *Smith v. Davis*, 1 Grant [Penn.] 158; *Paul v. Ball*, 31 Tex. 10; *Poole v. Poole*, 7 L. R., Ch. App. 17; *Colton v. Colton*, 127 U. S. 300.) The questions in issue here were not determined in the litigation over the construction of the will. (89 N. Y. 241; *Langdon v. Astor*, 16 id. 26; 23 Hun, 299, 305.) The advancements were indebtednesses which necessarily form part of the personal estate, and would be collected by the executor on the settlement of the estate. (3 R. S. [7th ed.] 2213, 2305; *McRae v. McRae*, 3 Brad. 199, 206.) A conveyance to a child, either directly or by a payment of the purchase-money, and having the deed made to the child, is *prima facie* an advancement. (*Weavers' Appeal*, 63 Penn. St. 309.)

FINCH, J. The problem to be solved on this appeal is the meaning and intent of a single provision in the will of the testator. By itself it presents no difficulty and is not at all ambiguous, but read, as it must be, in connection with the entries standing upon the books of the testator at the date of his death, it invites a scrutiny which has led to different and contradictory constructions. The provision reads thus: "All moneys or indebtedness which shall appear upon any inven-

Opinion of the Court, per FINCH, J.

tory or ledger or books of account kept by me or under my direction, charged as due to me from any or either of my said children or Robert College of Constantinople during my lifetime and as an outstanding or unsettled account at the time of my decease, whether with or without security, shall be considered as forming part of my estate mentioned or referred to in the fourth article of this my will, and a discharge from such indebtedness by my executors shall be deemed and taken as an equivalent of an equal amount paid such college, child or children on account of its, his, her or their share or portion under this my will."

If we pause for a moment to scan this language and gather the testator's meaning from his words alone, it is impossible not to see that he refers to existing debts due and payable to him, some of which are secured by collateral liabilities and some of which may not be, but all of which stand charged against the debtors as outstanding and unsettled accounts and are capable of being released and discharged by his executors. The description plainly contemplates cases of actual indebtedness which might have been enforced by the testator in his lifetime, and which his books show were not so enforced, but remain unsettled and outstanding at his death. The use of the word "moneys" preceding the words "or indebtedness" does not throw a doubt upon this interpretation, for they are included in the phrase "such indebtedness" when the discharge is referred to, and must be charged as due to the testator, and as an outstanding and unsettled account, and constituting a liability which admitted of a release.

That this interpretation is, upon the face of the provision, the natural and obvious meaning of the testator is quite evident from the impression which it left upon our minds when other questions arising out of this will were before us for determination. (*Robert v. Corning*, 89 N. Y. 241.) I do not think we then settled the question now raised, for the testator's words were not at that time confronted with his books of account or the entries upon them, nor was accurate attention challenged or analysis demanded in view of those entries; but the case in

Opinion of the Court, per FINCH, J.

all the courts drew out an expression of what seemed the natural and obvious interpretation of the provision. The Special Term said "the whole phraseology shows that it was only existing indebtedness which was to be deducted if found charged on testator's books, and that the charges on the books were not to be arbitrarily deducted, but must have their foundation in an indebtedness." The General Term added, "the indebtedness must be actual and such as would form, by reason of its character, a portion of the personal estate which could be collected by the executors." And we said of it that it was "intended to provide simply that any actual indebtedness found charged concurrently therewith on the testator's books of account should go in diminution of the payments to the several legatees as a part of their shares, respectively." These expressions show one thing at least; that the words of the testator, taken by themselves, conveyed a precise and definite idea, about which there was no room for doubt or hesitation; and that, if ambiguous at all, they have become so by the light thrown upon them from the facts to which they have been applied.

But the provision in the will continued thus: "And my executors are hereby directed to deduct the amount of such indebtedness from such respective share or portion, but no interest is to be charged upon or added to any such indebtedness, except in case a bond, note or other obligation, securing such indebtedness, be found among my assets, upon which said bond, note or obligation interest has been paid or charged, in which case the said indebtedness shall continue to be charged with interest." In this clause we find an added incident of the indebtedness before referred to. It is such as is interest bearing, either by its own terms or by operation of law consequent upon its being due and payable, and the object of the provision is to interfere with and modify the legal rules which would attach interest to the debt due or to become due. It means that interest is not to attach to the debt, except where a note or obligation exists, upon which interest has been paid or charged. Here again the character of the indebtedness

Opinion of the Court, per FINCH, J.

referred to by the testator is stamped upon it by an indelible mark. It is an indebtedness which, by its terms, or because it is "charged as due," is interest bearing, and, therefore, can only mean an actual debt which the child, as debtor, owes to the father as creditor, and which the entry upon the books, as an outstanding account, shows that the father has not forgiven or discharged.

The will then adds a further provision to avoid a possible mistake or misapprehension, and one upon which the respondents very much rely. That clause reads: "Any items or charges which may appear in any account of my private, personal or family expenses, shall not be included or charged as such indebtedness. Nor shall any moneys which shall appear in my books charged to either of my said children to a furniture or allowance account be debited to such child on the settlement of my estate, but the same is considered as a gift made by me to such child in my lifetime." The distinction here made impresses my mind as one of the most decisive character. It is between a debt and a gift; a debt due and payable, and a gift not payable at all; a claim capable of collection and enforcement, and a donation executed and ended; a debt to be deducted, and a gift not to be deducted. The clause indicates a recollection in the mind of the testator that there stood upon his books charges in his private account or against his children, which, on their face, would appear to be debts, and the true character of which, as gifts, the books would not disclose; and so, under his will, his intention would be thwarted, and, what was really a gift and not a debt, would stand as a debt for want of an explanation in or a disclosure of the truth by the books themselves. To guard against that error he puts the explanation, which the books do not contain, in the will itself, and so substantially declares that entries are upon his books which import a debt from the form in which they are made, but which, in truth, are not a debt but a gift, and were so intended, and which, therefore, should not be included in the deductions from shares or portions. So that in every possible way, by direct expression and indirect description, by

Opinion of the Court, per FINCH, J.

definite incidents and characteristics, and by a special exclusion of gifts made and executed, although entered in form as debts, this testator, a man unusually careful and methodical, thoughtful in his purposes and accurate in their execution, impresses upon us by his will that what he directs should be deducted from each child's share or portion is that child's debt due and payable to the testator and not forgiven, but not any gift or donation made and executed as such and with that purpose and intent. I reach this construction from the language of the will alone, without drawing upon the surrounding circumstances as an aid to the interpretation, or fortifying the construction by an appeal to consequences. Whether this interpretation is made doubtful, or the language should apply to something which, though not a debt, was regarded by the testator as a debt, remains the final question to be considered.

The testator executed the will in January, 1878, and died in the succeeding October. He left four children, Christopher, whose account as executor is here involved, Frederick, Howell, and Jane, his only daughter, and married to Ephraim L. Corning. The evidence indicates that a prior will was made, about a year and a half before the one probated, the contents of which we do not accurately know, except that the sixth clause, now under consideration, seems to have been identical in both instruments. The witness also thought that in the earlier will the estate was divided into fiftieths, and he had an impression that their distribution was the same as in the final will, although he felt obliged to say, "I do not know." So that it may be possible to assume that in the early part of 1876, a will of the testator was in existence substantially like the one probated in the material respects with which we are concerned; but the ledger account with Mrs. Corning ends January 1, 1874, and that of Frederick, January 1, 1876, and those accounts began and ended when no will was in existence at all, or if by possibility there was one, we know nothing of its contents, and have no proof of its execution, and the accounts were begun and continued in contemplation of a possible death intestate.

Opinion of the Court, per FINCH, J.

On the 13th of February, 1864, the testator advanced to his son Frederick \$20,000, and made the following entry in his journal: "*Advanced* to Frederick Robert, on account of his portion of my estate, in order to enable him to go into business, which is to be charged to him on settlement of my estate, with no interest, \$20,000." On the 6th day of May, in the same year, he made this entry: "Paid John H. Sherwood, for house and lot No. 8 East Fortieth street, which I have *given* my daughter, Mrs. Jane R. Corning, by deed from the said Sherwood, as her separate property, as a part of her share in my estate, \$50,000. I charge the amount to her, but though counted as part of my assets, no interest is to be charged thereon."

It is not easy to mistake the meaning of these entries. They import, in each case, an advancement, to be charged and counted in case of intestacy, in order to produce equality of distribution. They import gifts executed, and intended as such, and not at all debts or liabilities in any manner due or payable to the testator or his estate. The money of Frederick is specifically described as an advancement; the house and lot to Mrs. Corning, as given to her for her separate property. Neither was to be paid back or restored; both were to be kept and retained. No element of debt or liability attached to either, and each was to be charged only as an advancement, and in accordance with the truth, and for the purpose of distribution in the possible emergency of an intestacy. For, while Mr. Robert may, even at that early date, have contemplated the making of a will at some time in the future, yet that is not certain, and at all events he knew that he had made none; he knew that death might come at any moment and produce intestacy, and he, who soberly declared that he never postponed a duty which should be done at once, guarded against the injustice and inequality which might follow intestacy, by recording his gifts as advancements, charging them to the son and daughter as such, and taking them out of the category of debts by stamping them as gifts, and declaring that they should be counted only for

Opinion of the Court, per FINCH, J.

the purposes of distribution, and that in view of the then existing state of affairs, which was a death intestate if he should die suddenly, or soon, or before he had found time or disposition to make or execute a will.

These advancements he charged, as he said he should, in his books and upon his accounts to Frederick and Jane, respectively. Those charges in no manner altered the inherent character of the gifts or changed them into a debt. Down to the close of the accounts, and in every repetition of the items, they were the original gifts, charged as such, and recording the true transaction and not a false one of a debt. The process of bookkeeping should not mislead us. The ledger entries and form of the inventories might import, if standing alone, an indebtedness of Mrs. Corning and Frederick, or something which the testator regarded as such, but the proof dissipates any such danger of mistake. One of the bookkeepers carefully explains that the character and meaning of the charge must all the time be referred back to the original journal entry from which it passed into the accounts, and once drawn into the system must continually reappear, but will never acquire any new meaning or have any changed effect. Gifts they were as entered upon the journal; gifts they remained when transferred to the ledger; and gifts still they were considered and regarded when they took their place upon the inventories, for there they were classified as "unavailable" assets. If ever they were debts due from the children, or would be so due after his decease, they were perfectly good and as available as any actual assets upon his list. The debts which some of his children did, in fact, owe him he did not hesitate to class among his available assets, but the items of advancement were classed as unavailable because they were merely constructive assets to be counted as such solely for purposes of distribution in the emergency of his dying intestate. In effect he so declares. In the inventory of December, 1874, after ascertaining the market-value of his available assets, he adds the three advancements to Frederick, Howell and Mrs. Corning under the phrase "amount due from," and says

Opinion of the Court, per FINCH, J.

at the end, "amount for distribution as near as I can tell." At that date he had made no will; at that date if he had died the law would have disposed of his property on that basis of equality which it deems the nearest approach to justice; and it was that distribution to which the father referred; in view of that distribution that the entries were made; and for the purposes of that distribution that the advances were charged as "amounts due me."

But after all these entries were made, and while they stood upon his books he made and executed his will. At that moment all questions of advancement disappeared, and the entries framed for the emergency of intestacy ceased to be material, since not the law but the testator himself was about to dictate the ultimate division of his estate, and do for himself that which seemed to him just. Treating Robert College as one of his children, he divided his estate into fiftieths. He gave to his son Christopher twelve parts, to Frederick eleven, to Howell twelve, to Mrs. Corning five and to Robert College ten. Here, on the face of it, is a singular inequality, which must have had some cause and some explanation. For sixteen years the testator had contemplated an equality of division among his children, and carefully kept his books and accounts so as to effect that equality in spite of his varying gifts to three out of the four. If he took those gifts into account, as we are bound to suppose that he did, substantial equality was preserved; for then it will appear that he took five parts from Mrs. Corning, whose advance of \$50,000 had been swollen by the sale of her house to \$70,000, because of that advance, and gave one part to Frederick, whose advance was less, and the remaining four to Christopher and Howell. If that was not the explanation, what was it? Mrs. Corning was his only daughter. He bought the house which he gave to her, and which adjoined his own, to keep her near to him. When she went abroad he expressed his disappointment, but soon followed her across the ocean, and traveled with her on the continent, and later, repeating his voyage, joined her in Paris,

Opinion of the Court, per FINCH, J.

where, in the atmosphere of her care, his last days were passed, and in the shadow of her sorrow he died. We are told that he could do as he pleased. Undoubtedly. But what it *was* that he pleased becomes the question, if we once reject the natural and reasonable explanation of his action.

Let us recur again to the language of the testator's will. When it was drawn there were three classes of charges against his children standing upon his books, of the form and foundation of which he had a perfect knowledge. First. There were debts due and payable to him as creditor from children who were his debtors. Frederick owed him for a loan of \$30,000, which, with interest and further sums lent, amounted in December of 1874 to a little over \$38,000; an indebtedness which the son does not at all dispute, or display any reluctance to pay. Christopher stands charged with more than \$40,000; Mrs. Corning with a varying balance on her special account, and Robert College with a small amount. Second. There were the gifts to three of the children, described in the accounts as gifts and in the inventories as unavailable assets entered as part of the estate for purposes of distribution before any will was made. And, third, there were moneys and property with which the children stood charged in form as debtors, but which, in reality, were gifts, though without adequate explanation in the books showing them to be such. To the first class the language of the sixth clause concededly applies and is satisfied by that application. To the second class it does not apply at all, and was not intended to apply. To the third class the explanation withheld in the books was given in the will, and that fact answers the inquiry of the respondent why the testator in the preparation of his will should have been careful to describe as gifts sums charged for furniture and for allowances but should omit such explanation as to the larger advances. The latter needed no explanation in the will, since they were fully explained in the books. The former were not explained in the books, and so required explanation in the will.

The executor deemed it his duty to deduct from Frederick's

share the gift of \$20,000, and from Mrs. Corning's the gift of \$50,000, the result being, in her case, that she was practically disinherited. The testator, in view of his precedent gifts to her, took away five-fiftieths from her share or portion, and then the executor charged them over again as debts, and canceled, substantially, the whole legacy bequeathed. The surrogate and the General Term sustained him in his action. The opinions rendered concede that the advancements were not an indebtedness in the ordinary sense of the expression, but insist that they were regarded as such by the testator when the charges were made, and must continue to be so regarded when the language of the will is to be construed. It seems to me quite certain that the testator never at any time regarded the advances as an indebtedness for any purpose whatever. He spread upon his books the exact truth, and made his entries to relate to that truth. He regarded the sums charged not as debts, but as gifts, and shows us not only that the distinction existed, but was in his mind, for, when he says of the furniture and allowance charges these may seem to be debts from the manner of their entry, but they are not debts, they are gifts, and, therefore, must not be deducted, he, in substance, says, I mean that debts shall be deducted and not gifts, even though the latter, for lack of explanation, appear to be debts. The advances were declared to be gifts on the face of the entries, were, in truth, gifts, and nothing else, and were regarded as such by the deceased, and it was as gifts and advances that they were charged, for the one purpose which dictated their entry, that of distribution in the emergency of intestacy.

Two things, however, are said in answer to this view of the case, which seem to require more deliberate consideration. While the accounts, as such, ended before the present will, or the one which preceded it, were made, and so were all made in contemplation of a possible intestacy, the inventories continue down to a later period, and one of them was made in December, 1877, shortly before the last will was executed, and in that, under the head of "unavailable property," are

Opinion of the Court, per FINCH, J.

included the gifts to Frederick and Mrs. Corning; and it is asked why the testator continued to inventory them, if by making a will the danger of intestacy was gone, and if by that will he had made the charges utterly immaterial. The question is a just one and demands an answer.

It would not have been strange if, by reason of the manner in which the inventories were made, and of the exigencies of an unyielding system of bookkeeping, it had happened that the later inventories followed the form of the earlier ones and repeated entries which had become needless; for each new inventory was naturally modeled by the bookkeeper upon that which preceded it, and would be likely to sweep over all the entries in the books. But this testator was a very careful and prudent man, and while his bookkeeper, in framing the inventories of 1876 and 1877, followed the form of those previously made, they disclose a marked and significant variation from those of 1874 and 1875. In those the unavailable assets were first deducted and then to the balance was added the advancements to Mrs. Corning and Frederick, and the consequent total described as the sum for distribution. This process clearly indicated that the two gifts were to form part of the estate for purposes of distribution. But this was before either of the wills were made or contemplated; and in the following inventories of 1876 and 1877 the "unavailable" assets are again deducted but *left deducted*. The gifts are no longer added to the sum total of the estate, for the purpose of their addition had ended. They are taken out and left out, and not even added as constructive assets, or stated to have formed part of the estate as aggregated for distribution. On the contrary, they are dismissed from the assets as utterly as if they had been bad debts or worthless property; and so dismissed for the first time at just about the date when, as nearly as we can judge, the earliest will was drawn. It was as if the testator had said in so many words — hitherto, while I had no will, I added the gifts made to Frederick and Jane to my assets for purposes of distribution and to preserve equality; but now, having made a will and dictated the distribution, I deduct

Opinion of the Court, per FINCH, J.

these from the inventory of my assets, and cease to include them in the total of my estate. Observe, too, that this marked and significant change must have been the product of a direct and intended interference of the testator himself. The book-keeper, left to himself, would have followed the long existing custom which added the gifts to the estate, and more especially would have followed the form of the preceding year, in which the gifts once deducted as unavailable assets, were again deliberately added to reach the total of the estate; and so the testator, in 1876, must himself, and purposely, have prevented their addition, in effect, declaring that they were not to be deemed for any purpose a part of the estate, the total of which was being ascertained. The consideration of this deliberate change impresses my mind as of very great weight.

But it is further asked why the sixth clause should have been inserted in the will at all if it related only to debts. The argument is that debts would have been assets and formed part of the estate for purposes of distribution without any provision to that effect in the will, and so the sixth clause must have had a different purpose. I think the answer is that it did have a further purpose, and that was to limit the right of the estate only to *such* debts of the children as the testator had not forgiven, and to exclude such as he did not choose to regard as debts, although they might prove to be legally of that character. And so the provision is, not that *all* debts of the children should be deducted, but *such* debts as his books showed he recognized to be debts and which stood thereon as due to him in the form of an open and unsettled account. The sixth clause, therefore, was not unnecessary or superfluous upon the construction which I think is the correct one.

Much might be added as to the consequences of a contrary interpretation; and as to other provisions of the will indirectly sustaining the view now presented, but quite enough has been written to show the grounds upon which I dissent from the conclusion of the courts below.

The judgment of the surrogate and the General Term should be reversed, and the case remitted to the surrogate for dis-

Statement of case.

tribution in accordance with the doctrine of this opinion; the costs of all parties to be paid out of the estate.

All concur, except RUGER, Ch. J., and DANFORTH, J., dissenting, and GRAY, J., taking no part.

Judgment accordingly.

ALBERT G. A. HARNICKELL, Respondent, v. THE NEW YORK
LIFE INSURANCE COMPANY, Appellant.

Plaintiff received two policies of insurance upon his life issued by defendant, giving his notes and a check for the premiums, under an agreement with defendant's agent, that certain policies then held by plaintiff in other companies, and which were delivered by him to said agent, should be surrendered by the latter to the insurers and their surrender value paid in cash, or paid-up policies obtained therefor, the amount in either case to be satisfactory to plaintiff. In case of the agent's failure to make arrangements for surrender, satisfactory to plaintiff, it was agreed the latter could return the policies and receive back his notes and check. The policies contained provisions to the effect that no agent of the company had power to make or modify the contract of insurance, or to bind it by any promise. The agent failed to effect a surrender of the old policies satisfactory to plaintiff, and on refusal of defendant to receive back its policies and surrender the notes and check, he brought suit to compel such surrender. *Held*, that said provisions in the policies related to the policies themselves after they became executed instruments between the parties; that the agreement with the agent as to a surrender of the old policies was a condition precedent to the full delivery and acceptance of defendant's policies, and until fully complied with or waived no valid contract of insurance existed; and, therefore, that said provisions did not apply; that it was immaterial whether the agent had power to make a conditional delivery or not, as plaintiff had power to attach such conditions as he chose to the acceptance, and if the agent lacked the power, the result would still be that there was no absolute acceptance, and so no contract; and that, therefore, plaintiff was entitled to the relief sought.

(Argued October 18, 1888; decided November 27, 1888.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made June 1, 1886, which reversed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term. (Reported below, 40 Hun, 558.)

Statement of case.

The plaintiff, in the year 1885, was the owner of several policies of insurance, issued upon his life by several different companies, for a total of \$35,500. Some of these were payable to his widow and minor children. One M. L. Hamlin, who was what is termed a special agent of the defendant, the New York Life Insurance Company, came to the plaintiff, in the winter or spring of that year, and desired him to take some insurance upon his life in that company. The plaintiff stated to him that he was insured for a sufficient amount and did not wish double insurance, whereupon Mr. Hamlin gave him estimates in regard to policies in his company, their cost, value, etc., and the negotiations finally culminated in an agreement, between the plaintiff and the agent, that the agent should take the policies, which the plaintiff already had in the other companies, and obtain the amount of their surrender value in cash, or paid-up policies therefor, to an amount, in either case, which should be satisfactory to the plaintiff, and upon the accomplishment of this the plaintiff would take two policies in the defendant company for \$25,000 each, upon terms agreed upon between him and the agent. Pursuant to this verbal understanding, the plaintiff signed an application for such policies, the agent agreeing to abate largely in the amount of the premium due thereon, and also that notes instead of cash should be paid by the plaintiff therefor. The application was sent on to the company as signed by the plaintiff, and in due time two policies of insurance were presented to him by the company through its agent, Mr. Hamlin. Up to this time the evidence is uncontradicted that the policies, in the defendant company, were only to be taken out by the plaintiff and received by him upon the successful negotiation by the defendant's agent with the other companies in which the plaintiff had policies for the payment of the surrender value of such policies in cash, or the issuing of paid-up policies therefor, the amount in either event to be satisfactory to the plaintiff.

Before these negotiations were carried through, in regard to the disposition of the policies which the plaintiff already had in the other companies, and after he had signed an appli-

Statement of case.

cation which had been sent to the home office, and after the agent had received back the policies in the defendant company, Mr. Hamlin called upon the plaintiff for the purpose of carrying out the negotiations, and brought to him the two policies for \$25,000 each issued by the defendant company. The plaintiff finally accepted the policies under an agreement entered into between him and Mr. Hamlin, as the agent of the defendant, and signed by them, respectively, which agreement is as follows :

“NEW YORK, *May 8, 1885.*

“TO M. L. HAMLIN, *Special Agent of the New York Life Insurance Company :*

“DEAR SIR. — I have received from you Policies No. 204233 for \$25,000, and 204234 for \$25,000, and have given promises of payment for the premiums thereon less rebate allowed, viz. :

	\$539 13	
My two notes.....	1,600 00	
Cheque.....	17 37	
	\$2,156 50	

“I hand you herewith together

5	Policies	endow'ts	in	Provident Co.		5,500 00
2	do	life	“	“	10,000 00
1	do	do	“	Equitable	5,000 00
3	do	do	“	Mutual Ben'f.	10,000 00
1	do	do	“	U. S. L. Co.	5,000 00

Which it is understood is all the policies I have now in force besides those of your company above-mentioned, and from which I want to realize a satisfactory amount in cash, and if not obtainable, then paid-up policies; and if nothing satisfactory to me can be obtained, then I understand that my old policies shall be left in force, and the above new ones in your company, if found by me necessary to wait, or omit taking them, can be returned to you and my above promises returned to me.

“Yours truly,

“A. G. A. HARNICKELL.

“M. L. HAMLIN.”

Statement of case.

The notes given by the plaintiff to the agent were by him forwarded to the home office and the account of such plaintiff with the company defendant was credited with the receipt thereof, a check for \$17.37 being retained by the agent.

The agent failing to obtain payment of the surrender value of or paid-up policies in exchange for the plaintiff's policies, upon any terms satisfactory to him, finally refused to continue negotiations any longer and refused to accept or retain the policies which had been delivered to him conditionally, and on the 6th of August, 1885, he wrote a letter to the company defendant and to the defendant Hamlin, as its agent, in which he stated the terms upon which the policies had been received by him and the other policies in other companies given up by him to Mr. Hamlin, and in which, after stating that they had wholly failed to effect a surrender of his policies upon terms satisfactory to him, or to effect any surrender at all, and had returned him such policies, he, therefore, notified them that he availed himself of the option reserved in his letter of the eighth of May and returned the policies to the defendant, and requested it to return to him his two notes for \$800 each, and his check for \$17.37. This letter was duly received by the defendants.

At the time the two policies were brought and given to the plaintiff he had had no communication concerning such policies with the company defendant, except through its agent, Mr. Hamlin. Nor did he, subsequent to that time, have any communication with the company defendant until he returned the policies to it inclosed in the letter of the 6th of August, 1885. In each of these policies were the following provisions:

"Inasmuch as only the officers at the home office of the company, in the city of New York, have authority to determine whether or not a policy shall issue on any application, and as they act on the written statements and representations made in the application for this policy, it is expressly understood and agreed that no information, statements or repre-

Statement of case.

sentations made or given by or to the person soliciting or taking the application for this policy, or to any other person, shall be binding on the company, or in any manner affect its rights, unless such information, statements, or representations have been reduced to writing and presented to the officers of the company at the home office, in the application referred to.

"No agent has power in behalf of the company to make or modify this or any contract of insurance, to extend the time for paying a premium, to issue a permit for residence, travel or occupation, or to bind the company by making any promise or receiving any representation or information. This power can be exercised only by the president, vice-president or actuary of the company, and will not be delegated."

The defendant corporation refused to surrender the notes above-mentioned or accept the policies sent back by the plaintiff, but claimed that by delivering to the plaintiff, through their agent, the two policies and the receipt by the company through such agent, of the plaintiff's notes, a valid contract of insurance was entered into between the parties, evidenced by the contents of the application signed by the plaintiff and by the policies issued thereon by the defendant; and that as they were wholly ignorant of any arrangement of the nature claimed by the plaintiff to have been made between him and Mr. Hamlin, that they were not affected therewith in any manner; and that, by reason of the provisions in regard to the limitation of the power of their agent as contained in the above extracts from the policies, the plaintiff had no cause of complaint against the company, but must look to the agent as an individual for the fulfillment of the arrangement made with him in regard to the policies. Thereupon the plaintiff commenced this action to have it adjudged that he had the right to return the two policies of insurance issued by the defendant to him and obtain the surrender to him by the defendant of the two notes and check given by him.

Wm. B. Hornblower for appellant. Written instruments cannot be varied or altered by parol testimony. (*In re Atty.*

Statement of case.

Gen. v. Con. L. Ins. Co., 93 N. Y. 74; *Ins. Co. v. Mowry*, 96 U. S. 544.) No words can be devised more clearly cutting off the right of the agent to, in any wise, bind the company to anything other than the contract contained in the application and the policy. (*N. Y. Life Ins. Co. v. Fletcher*, 117 U. S. 519, 530; *Simons v. N. Y. Life Ins. Co.*, 38 Hun, 309; *Chase v. Hamilton Ins. Co.*, 20 N. Y. 52, 55, 57; *Rohrbach v. Germania Fire Ins. Co.*, 62 id. 47; *Mersebau v. Phoenix Mut. Life Ins. Co.*, 66 id. 274; *Alexander v. Ger. Fire Ins. Co.*, id. 464; *Marvin v. Universal Life Ins. Co.*, 85 id. 278.) Where an insurance company fully protects itself by giving due and timely notice to applicants of the limitations of the powers of its agents, it should not be thereafter held liable by collateral arrangements unknown to the officers of the company, and clearly in excess of the powers of the agent as limited by the terms of the application and the policies. (*N. Y. Life Ins. Co. v. Statham*, 93 U. S. 24, 30; *Klein v. N. Y. Life Ins. Co.*, 104 id. 88; *Roehner v. Knickerbocker Life Ins. Co.*, 93 N. Y. 70; *Evans v. U. S. Life Ins. Co.*, 64 id. 304; *Wheeler v. Conn. Life Ins. Co.*, 82 id. 543; *Douglas v. Knick. Life Ins. Co.*, 83 id. 504; *Whitehead v. N. Y. Life Ins. Co.*, 102 id. 143; *Bogardus v. N. Y. Life Ins. Co.*, 101 id. 338.) The fair construction of the agreement is that the applicant made a collateral contract with Hamlin, as an individual, by which Hamlin agreed to accomplish certain results. The company was not a party and was not expected to be a party to this agreement, and Hamlin alone would be liable for damages in case of a breach of the agreement. (*Coleman v. First Nat. Bank of Elmira*, 53 N. Y. 388, 393.) The company is not bound by any alleged false representations of Hamlin, special agent, as to the surrender values which he could obtain for the other policies of plaintiff. (*Romeyn v. Sickles*, 108 N. Y. 652; *Day v. Town of New Lots*, 107 id. 148; *Southwick v. First Nat. Bk. of Memphis*, 61 How. Pr. 170.) An expression of opinion is not a representation of fact upon which a charge of fraud can be predicated. (*Simons v. N. Y. L. Ins. Co.*, 38 Hun, 309; Bigelow

Statement of case.

on Fraud, 14; *Walker v. Mobile & O. R. R. Co.*, 34 Miss. 245; Kerr on Fraud and Mistake, 82.) Under the terms of the clauses in the application and policies, the company is in no respect chargeable with any false representation of the agent. (*Simons v. N. Y. L. Ins. Co.*, 38 Hun, 314; *Shawmut Mut. L. Ins. Co. v. Stevens*, 91 Mass. 332; *Chase v. Ham. Ins. Co.*, 20 N. Y. 52.) A corporation may protect itself, by contract, from liability for the torts of its servants. (*Bissell v. N. Y. C. R. R. Co.*, 25 N. Y. 442; *Wilson v. N. Y. C. R. R. Co.*, 97 id. 87; *N. Y. L. Ins. Co. v. Fletcher*, 117 U. S. 519.) A delivery cannot be made to the party upon a condition subsequent not expressed in the instrument, such as that the instrument should be given up in an event which may have afterward arisen. (*Hodge v. Security Ins. Co.*, 33 Hun, 586; *Tower v. Richardson*, 6 Allen, 351; *Spring v. Lovett*, 11 Pick. 417; *Adams v. Wilson*, 12 Metc. 138; *Underwood v. Simonds*, Id. 275; *Henshaw v. Dutton*, 59 Mo. 139; *Isaacs v. Elkins*, 11 Vt. 681; *Hatch v. Hyde*, 14 id. 25.) Notice to an agent is not notice to a principal, unless it is within the scope of the authority to receive notice, or unless he is a general agent for the principal. (*Hodge v. Security Ins. Co.*, 33 Hun, 583, 587; *Wilson v. Genesee Mut. Ins. Co.*, 14 N. Y. 418; *Hermann v. Niagara Fire Ins. Co.*, 100 id. 411; *Atlantic State Bk. v. Savery*, 82 id. 291.)

John M. Bowers for respondent. Hamlin, as the agent of the defendant, was clothed with power to make the agreement in question. (*Davis v. Lamar Ins. Co.*, 18 Hun, 230; *Bodine v. Ex. F. Ins. Co.*, 51 N. Y. 177; *Devendorf v. Beardsley*, 23 Barb. 656; *Mentz v. Lancaster Fire Ins. Co.*, 79 Penn. St. 476; *Combs v. Shrewsbury Fire Ins. Co.*, 34 N. J. Eq. 403; *Boice v. T. & M. M. Ins. Co.*, 38 Hun, 246; *Leeds v. Mech. F. Ins. Co.*, 4 Seld. 351; *Rowley v. Empire Ins. Co.*, 36 N. Y. 550, 553, 554; *Owens v. H. P. Ins. Co.*, 56 id. 570; *Baker v. Home L. Ins. Co.*, 64 id. 648, 649; *Mowry v. Rosendale*, 74 id. 360; *Flynn v. Eq. L. Ins. Co.*, 78 id. 568; *Ins. Co. v. Wilkinson*, 13 Wall. 222, 234; *Miller*

Opinion of the Court, per PECKHAM, J.

v. *Phoenix Mut. L. Ins. Co.*, 107 N. Y. 292; Bliss on Life Ins. § 280.) Upon the question of the scope of Hamlin's power, the language of the policies must be taken most strongly against the defendant. (Wood on Inter. of Mer. Agreements, 3; Elphinstone's Inter. of Deeds, 93, rule 21; *Bullin v. Dunning*, 5 B. & C. 850; Broom's Legal Maxims, 596, note 1, 598; *Notman v. Anchor Asso. Co.*, 4 C. B. [N. S.] 481 [93 E. C. L. R.]; *Filton v. Ac. Death Ins. Co.*, 17 C. B. [N. S.] 134, 135 [112 E. C. L. R.]; *Ripley v. Larmouth*, 56 Barb. 21, 25; *Marvin v. Stone*, 2 Cow. 781; *Dilleber v. Home Life Ins. Co.*, 69 N. Y. 256.) Hamlin's power to make the agreement in question was not restricted by anything in the policies or application blanks. (40 Hun, 560, 561.) Whether, therefore, Hamlin shall be held to have been the accredited agent, with full power, acting for the New York Life Insurance Company, or a mere messenger to carry the policies, no contract was completed, because the plaintiff did not accept the policies. (*Brackett v. Barney*, 28 N. Y. 333; *Jackson v. Phipps*, 12 Johns. 418; *Crosby v. Hilyer*, 24 Wend. 280; *Fisher v. Hall*, 41 N. Y. 416; *Bert v. Brown*, 25 Hun, 223; *Ford v. James*, 4 Keyes, 300.) The company is bound by the fraudulent representations made by its agents soliciting insurance. (*Devendorf v. Beardsley*, 23 Barb. 656; Bliss on Life Ins. 294; 40 Hun, 562.) Consideration for the checks and notes having failed, by reason of the failure of the contract of insurance, they cease to be legal obligations, and defendant has no right in law or equity to them. (*Benton v. Martin*, 52 N. Y. 570; *Frisbee v. Hofnagel*, 11 Johns. 50; *McAllister v. Reab*, 4 Wend. 483; *Whitford v. Laidler*, 94 N. Y. 145.) The court can compel surrender of the notes and check. (*Western R. R. Co. v. Bayne*, 75 N. Y. 1; 2 Story's Eq. Jur. § 700, note 1; *McKenny v. Hazard*, 45 N. Y. 581; *Town of Springport v. Teutonia Bank*, 75 id. 397; Chitty on Bills, 110; Daniels Ch. Pr. 1651.)

PECKHAM, J. There was no contradictory evidence in the case. At its close the plaintiff requested the court to find the

Opinion of the Court, per PECKHAM, J.

following fact: "That a delivery of the said policies was accepted by the said plaintiff upon the terms and conditions shown in the agreement signed by the plaintiff and the said Hamlin, a correct copy of which is attached to the complaint in this action marked 'A,' and also to these findings." The court refused to make such finding, and the plaintiff excepted. If the finding asked for was material and based upon sufficient and uncontradicted evidence, the request should have been granted, and a failure to grant it was error, for which the judgment should be reversed.

We think the fact was material and was based upon sufficient and uncontradicted evidence. It thus appears that an agent of the defendant entered into an agreement with the plaintiff by which the two policies subsequently issued by the defendant were to be accepted by the plaintiff, only upon condition that certain other policies then delivered by the plaintiff to the agent should be surrendered by him to the companies issuing them, and their surrender value in cash paid to him or paid-up policies given in exchange therefor, in either case in amounts satisfactory to the plaintiff. This, we think, was clearly a condition precedent to the full delivery and acceptance of these policies issued by the defendant, and until such condition precedent was complied with or waived, no fully executed and valid contract of insurance existed between these parties.

No question of right to conditionally receive an instrument, not under seal, by a party thereto can be successfully raised. *Benton v. Martin* (52 N. Y. 570) decides this proposition, and leaves it unnecessary for us to discuss the abstract question as to whether there is or is not a good reason for the distinction between the case of a sealed and an unsealed instrument in this respect.

The provisions contained in the policies, which are above quoted, relate to the policies themselves after they should become executed instruments between the parties. All negotiations had before such event, and all parol agreements between the assured and the agent of the defendant, would

Opinion of the Court, per PECKHAM, J.

have been merged in the contract evidenced by the policies themselves, had the negotiations been carried out as intended, and such policies been absolutely delivered to and accepted by the plaintiff. Hence any oral representation or statements made by the agent of the company, and not contained in the contract of insurance, would have formed no part thereof, and could not have been insisted upon by the plaintiff as against the defendant company. Such are the cases which have been cited by the learned counsel for the defendant in relation to the absolute merger of all previous negotiations between the agent and the insured in the written contract of insurance.

The learned counsel for the defendant claims that the condition referred to, assuming it to have been made, was a condition subsequent, and that, at all events, a condition subsequent would be invalid as against the contract evidenced by the policies. He says the contract entered into was to cease to be of any effect in case Hamlin did not obtain the surrender or exchange of the plaintiff's policies in the companies. We think that, instead of the contract ceasing to be of any effect in case Hamlin failed to accomplish the surrender, the plain meaning was that the contract should not exist until Hamlin had brought about the exchange. In other words, there was not a contract entered into with a provision that it should cease to bind in case Hamlin failed to redeem his promise in the future, but the contract was not to become binding in any event until the condition was performed by Hamlin. And, upon its performance, and not until then, was the contract to become effective.

We think, with the learned court below, that it is wholly unimportant whether Hamlin had any power from the company to make a conditional delivery or not. The plaintiff had power to attach such conditions as he chose to the acceptance of the policies, and if the agent of the company had no power to make conditional delivery to the plaintiff, the result would still be that no contract was ever made and no absolute acceptance ever had. It cannot be argued for one moment that an absolute delivery of a paper is made to an individual who has

Opinion of the Court, per PECKHAM, J.

power to and does refuse to accept it, except upon condition, because the person who assumed to make the delivery was an agent who had no authority from his principal to make a conditional delivery.

Nor do we think that any inconvenience, at least of much weight, will follow the result of holding that an individual can refuse to accept a policy of insurance from a corporation, except upon the performance of some condition precedent under an arrangement made between him and an agent of the company, which arrangement the agent fails to communicate to the corporation. Insurance companies may, with entire propriety, provide in the same manner as the defendant provided in the policies in question, in cases where the contract of insurance becomes executed. There it is highly necessary and important for the company to know exactly how far they are bound and the entire nature of the contract which has been made between them and the assured. But an agreement between an individual and the agent of a company, by which the policy is accepted only upon conditions relating to the same, and an agreement to hold the policy until the performance of those conditions, or a failure to perform, cannot, as we think, result in any serious inconvenience to the company. But whether that is so or not cannot alter the right of an individual to refuse to be bound by a policy of insurance until he has absolutely received and accepted it.

We think the order of the General Term was right and should be affirmed, and judgment absolute granted against the defendant, with costs.

All concur.

Order affirmed, and judgment accordingly.

Statement of case.

SYLVESTER S. MANGAM et al., as Executors, etc., Respondents,
v. RICHARD W. PECK, Impleaded, etc., Appellant.

111	401
119	547
111	401
135	200

The rule of the common law making a husband liable for the tortious acts of his wife, was not abrogated by the Code of Civil Procedure and is still in force.

Accordingly *held*, that a husband was properly joined with his wife, as defendant, in an action to recover damages for a fraud perpetrated by the wife.

(Submitted October 19, 1888; decided November 27, 1888.)

APPEAL by defendant, Richard W. Peck, from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 23, 1886, which affirmed a judgment in favor of plaintiff, entered upon a verdict and which denied a motion for a new trial.

The action was brought to recover damages against defendant Richard W. Peck and Ellen E. K. Peck, his wife, for the torts committed by the latter.

The proofs showed that an application was made to these plaintiffs for a loan of \$4,000, by defendant Ellen Peck, representing herself as acting for her husband. During the negotiation, and as authority for her acts, she presented a letter purporting to come from her husband. She delivered a bond and mortgage to the plaintiffs as security for the loan, purporting and represented by her to be executed by her husband. She was not authorized to effect the loan, and the letter, bond and mortgage were admitted to be forgeries, and, in an action between these same parties, the latter instruments were adjudged to be forgeries and void as against the husband, and the mortgage was canceled of record. Pending the action referred to, these plaintiffs instituted a suit to foreclose their mortgage, which Richard Peck successfully defended, alleging the forgeries. These plaintiffs obtained a verdict for the expenses incurred in the prosecution and

Statement of case.

defense by them of the actions, and for the \$4,000, with interest thereon, advanced by them on the faith of the pretended mortgage.

Richard W. Peck for appellant. It is not proper to join, as a party defendant, the husband in an action for the personal torts of his wife. (Code of Civil Pro. § 450; *Fitzgerald v. Quann*, 109 N. Y. 441.) The husband is not liable for a tort by the wife. (*Cassin v. Delany*, 38 N. Y. 178; Schouler on Husband and Wife, § 135; *Kowing v. Manly*, 49 N. Y. 193, 200, 201.) Nor where the basis of fraud is the wife's contract, or in a case of mixed contract and tort. (Schouler on Husband and Wife, § 138; *Liverpool Adelpia Loan Ass'n. v. Fairhurst*, 9 Exch. 422; *Woodward v. Barnes*, 46 Vt. 332; *Keen v. Hartman*, 43 Penn. St. 497; *Barnes v. Harris*, Busbee, 15; *Carleton v. Haywood*, 49 N. H. 314; 1 Bishop on Married Women, § 906.)

William V. Rowe and *Treadwell Cleveland* for respondents. A husband is liable for his wife's tort. (*Fitzgerald v. Quann*, 109 N. Y. 441; 33 Hun, 652.) At common law the husband is liable with his wife for her torts committed during coverture, in an action to be brought against husband and wife jointly. (*Bertles v. Nunan*, 92 N. Y. 156, 157, 165, 198, 203; Bacon's Ab., Baron and Feme L.; Coke Litt. §§ 168, 187, 391, 665; 1 Bl. Comm. 442; *Rowe v. Smith*, 45 N. Y. 233; *McQueen v. Fulgham*, 27 Tex. 467; Reeve's Dom. Rel. 69, 70, 72; *Capel v. Powell*, 17 C. B. [N. S.] 743, 748; *McMichael v. Kane*, 25 N. Y. D'y Reg. 1225; 5 Legal Ad. 263; *Head v. Briscoe*, 5 C. & P. 484, 485, 486; *Clayton v. Adams*, 6 T. R. 604; *Marshall v. Rutton*, 8 T. R. 545; *Ferguson v. Brooks*, 67 Me. 251, 255; 2 Kent's Com. 149; 1 Addison on Torts [6th ed. 1887], 122, 124; Schouler on Husband and Wife, §§ 138, 139; Stewart on Husband and Wife, §§ 14, 66; *Goulding v. Davidson*, 26 N. Y. 604, 606; *Baum v. Mullen*, 47 id. 577; *Rowe v. Smith*, 45 id. 233; *Vanneman v. Powers*, 56 id. 43; *Tait v. Culbertson*, 57 Barb. 9;

Opinion of the Court, per GRAY, J.

Wainford v. Heyl, L. R., 20 Eq. 321; *Freethy v. Freethy*, 42 Barb. 641; *Schultz v. Schultz*, 89 N. Y. 644; 27 Hun, 26; *Longendyke v. Longendyke*, 44 Barb. 366; *Perkins v. Perkins*, 62 Barb. 531.) There is nothing, either expressly or implied, in section 450, or any other section of the Code of Civil Procedure, or in the various married women acts, or other statutes of this state, which, in any sense or degree, modifies or restricts the common-law liability of the husband for his wife's tort, and his liability to be joined with her as a party defendant in all actions therefor. (1 Kent's Comm. 464; Potter's Dwaris on Stat. 185; *Bertles v. Nunan*, 92 N. Y. 157, 160; *Linderman v. Farquharson*, 101 id. 434; Schouler on Husband and Wife, § 137; *Janinski v. Heidelberg*, 21 Hun, 439; *Muser v. Lewis*, 50 N. Y. Super. Ct. [18 J. & S.] 431, 439, 440; *Wainford v. Heyl*, L. R., 20 Eq. 321, 324; *Coleman v. Burr*, 93 N. Y. 24, 25; *Rowe v. Smith*, 45 id. 230, 233; *Baum v. Mullen*, 47 id. 577, 579; *Goulding v. Davidson*, 26 N. Y. 604, 606; *Vanneman v. Powers*, 56 id. 43; *Matthews v. Fiatal*, 2 E. D. Smith, 90, 91; *Tait v. Culbertson*, 57 Barb. 9; *Trebing v. Vitter*, 2 Civ. Pro. [McCarty], 391; *Fitzgerald v. Quann*, 33 Hun, 652; 109 N. Y. 441; *McMichael v. Kane*, 25 Daily Reg. 1225; *Serokan v. Kattenberg*, 17 Q. B. D. 177, 179, 180; 21 Eng. L. J. 522, 523; *Scott v. Morley*, 20 Q. B. D. 120.) Statutes removing the disabilities of married women cannot be considered as enlarging or modifying the liabilities of husbands. (*White v. Wager*, 25, N. Y. 332, 333; *Perkins v. Perkins*, 62 Barb. 531; *Ritter v. Ritter*, 31 Pa. St. 396; *Bear's, Admr., v. Bear*, 33 id. 527; *Pettit v. Fretz*, 33 id. 118; *Diver v. Diver*, 56 id. 100; *Freethy v. Freethy*, 42 Barb. 641; *Longendyke v. Longendyke*, 44 id. 366; *Schultz v. Schultz*, 89 id. 644; 27 Hun, 26; Stewart on Husband and Wife, § 66; *McElfresh v. Kirkendall*, 36 Iowa, 224, 225; *Coleman v. Burr*, 93 N. Y. 18, 24.)

GRAY, J. The sole question presented by this appeal is as to the liability of this defendant for the tortious acts com-

Statement of case.

mitted by his wife, the defendant, Ellen Peck. There is no question but that the plaintiffs had a perfect cause of action for the losses occurring to them as the direct result of the fraud and deception practiced by her upon them. That being the case, it falls within the principle lately decided by us in *Fitzgerald v. Quann* (109 N. Y. 441). In that case, which was an action to recover for the injury caused by the slanderous words spoken by the wife, and in which her husband was joined with her as defendant, we held that the common-law rule of liability had not been abrogated, either by express legislation or by the provisions of the Code of Civil Procedure. Nothing in the appellant's case suggests any distinction in principle between it and that of *Fitzgerald v. Quann*. The record exhibits no errors upon the trial and the judgment should be affirmed, with costs.

All concur, except DANFORTH and FINCH, JJ., not voting.
Judgment affirmed.

111	404
169	*464

111	404
170	*161

In the Matter of the Judicial Settlement of the Estate of
CHARLES B. GRAY, Deceased.

The right of a creditor of a firm to share in the estate of a deceased member of the firm in the hands of his administrator, where there is no joint estate and the surviving partner is insolvent, is governed by the rules by which courts of equity are guided in distributing the separate estate of an insolvent as between his separate creditors and those of a copartnership of which he was a member.

While, as a general rule in such cases, the separate creditors are entitled to be first paid, where a creditor at the time a debt is contracted for the benefit of the firm, requires therefor and receives the joint and several obligation of the copartners individually, it thereby becomes the several debt of each of them; the holder is entitled to the benefit of the security according to its terms, and has the right to prove it against the separate estate of the decedent, and to share equally with the other separate creditors in the distribution.

(Argued October 19, 1888; decided November 27, 1888.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made December

Statement of case.

14, 1886, reversing in part a decree of the surrogate of the county of Orange, upon settlement of the accounts of Lewis E. Carr, as administrator of the estate of Charles B. Gray, deceased. (Reported below, 42 Hun, 411.)

Upon the accounting Sarah B. Lockwood, who held a joint and several note, executed by the decedent, C. G. Lockwood and herself, payable to the order of H. H. Farnum, presented the same as a claim against the estate. It appeared that the makers, Gray and Lockwood, composed the firm of Gray & Lockwood; that the note was given for a loan made by said Farnum for the benefit of the firm; that said Sarah B. Lockwood signed it for the benefit and accommodation of the other makers and was compelled to take it up; that Lockwood, the surviving member of the firm, was insolvent, and there were no firm assets. There were not sufficient assets of the estate to pay the individual and the firm creditors. Mrs. Lockwood claimed the right to share equally with the individual creditors in the distribution. This the surrogate refused, holding that the claim was a firm debt and so must be deferred until the individual claims were paid in full. The appeal was from this portion of the decree.

Lewis E. Carr for appellant. The claimant is a creditor of the firm of Gray & Lockwood, as to her entire claim, and was entitled to such, and only such, remedy against the estate of Gray, one of the partners, as creditors of partnerships are entitled to against the separate estates of individual partners. (Edwards on Bills [3d ed.] §§ 722, 723, 764; *Corey v. White*, 3 Barb. 12, 16; *Dillenbeck v. Dygert*, 97 N. Y. 303, 307, 308; Lindley on Partnership [5th ed., Notes by Wentworth], 375; *Ganson v. Lathrop*, 25 Barb. 455; *Robinson v. Robinson*, 1 Lans. 117, 119; *McCarthy v. Fitts*, 20 Week. Dig. 225; *Wells v. Miller*, 66 N. Y. 255; *Kirby v. Carpenter*, 7 Barb. 373, 378; *Morgan v. Skidmore*, 3 Abb. N. C. 92, note 93, 94; *In re Gray*, 42 Hun, 411, 413.) The claimant may not have her claim paid out of the estate of Gray until his individual creditors have been paid in full. (3 Kent, marg. p. 65; *Payne*

Statement of case.

v. *Mathews*, 6 Paige, 19, 20; *Jackson v. Connell*, 1 Sandf. Ch. 348, 350; *Wilder v. Keeler*, 3 Paige, 167, 171, 172; *Egbert v. Wood*, 3 id. 517, 527; *Meech v. Allen*, 17 N. Y. 300, 301; *Morgan v. Skidmore*, 3 Abb. N. C. 92; *McCulloch v. Dashfield's Ad.*, 18 Am. Dec. 271, 281; *Stewart's Case*, 4 Abb. Pr. 408; 4 Brad. 254; *Kirby v. Carpenter*, 7 Barb. 373, 378; *Ganson v. Lathrop*, 25 id. 455; *Scott v. Guthrie*, 10 Bosw. 408, 416; *Wilson v. Robertson*, 21 N. Y. 587; *Menagh v. Whitwell*, 52 id. 146; *Hewitt v. Northrup*, 75 id. 506, 509; *In re Rieser*, 19 Hun, 202; 81 N. Y. 629; *Pope v. Cole*, 55 id. 124; *Richter v. Poppenhausen*, 42 id. 373.) The judgment, on the reference of Mrs Lockwood's claim, under the statute, did not prevent the application of this rule marshaling assets. First. Because the judgment does not profess to direct as to the manner of distribution of Gray's estate. Second. Because the referee and court there had no jurisdiction of the subject-matter of the distribution of the estate of Gray, or of the individual creditors to be affected by such a decree. (*Radley v. Fisher*, 24 How. 404; *Boyd v. Bigelow*, 14 id. 511; *Caro v. R. R. Co.*, 2 Civ. Pro. Rep. 371; *People ex rel. Banta v. Kent*, 58 How. 407; *Campbell v. Seaman*, 63 N. Y. 568, 586; *Kenney v. Appgar*, 93 id. 539, 548; *Roe v. Boyle*, 81 id. 305; *Mowrey v. Peet*, 88 id. 453, 456; *Young v. Cuddy*, 23 Hun, 249; Code of Civ. Pro. §§ 3333, 3334; *Hatch v. Stewart*, 42 Hun, 164; 3 R. S. [7th ed.] 2300, §§ 36, 37; *Woodley v. Bagley*, 13 Wend. 453; *Wilder v. Keeler*, 3 Paige, 167; Code of Civ. Pro. §§ 2729, 2730, 2742; *Weeks v. Weeks*, 16 Abb. N. C. 143; *McArthur v. Scott*, 113 U. S. 340; *People v. Sturtevant*, 9 N. Y. 263; *Elliott v. Piersol*, 1 Pet. 340; *Wilcox v. Jackson*, 13 id. 511; *State of R. I. v. State of Mass.*, 12 id. 718; *Thompson v. Taylor*, 71 N. Y. 217; *Burr v. Bigler*, 16 Abb. Pr. 177; *Brower v. Bowers*, 1 Abb. Ct. App. Dec. 219; *Case v. Reeves*, 14 Johns. 79; *Marsh v. Masterson*, 50 Sup. Ct. Rep. 187, 193; *Miller v. Manice*, 6 Hill, 114, 122; *Steinbach v. Ins. Co.*, 77 N. Y. 498, 501; *Barth v. Burt*, 17 Abb. Pr. 349; *Burdick v. Post*, 12 Barb.

Statement of case.

168; *Campbell v. Consalus*, 25 N. Y. 613; *N. Y. & H. R. R. Co. v. Kyle*, 5 Bosw. 587; *Royce v. Burt*, 42 Barb. 655; *Rem. Paper Co. v. Dougherty*, 81 N. Y. 474; *Durant v. Abendroth*, 97 id. 132; *Lorillard v. Clyde*, 99 id. 196; *Westervelt v. Westervelt*, 46 Supr. Ct. Rep. 298; *Ferris v. Van Vechten*, 73 N. Y. 113; *Perry v. Dickinson*, 85 id. 345; *In re Hood*, 98 id. 363; *Pittman v. Johnson*, 35 Hun, 38; 15 Abb. N. C. 472; *Belden v. State*, 103 N. Y. 1; *Acker v. Leland*, 109 id. 519.)

C. E. Cuddeback for respondent. The administrator was trustee for all persons interested in the personal estate, whether creditors, legatees or distributees. (*Wager v. Wager*, 89 N. Y. 161; *Redfield on Surrogates*, 428; 2 R. S. 87, § 27; *Laws of 1858*, chap. 314, § 1; *Buckhout v. Hunt*, 16 How. Pr. 407; *Fisher v. Banta*, 66 N. Y. 468, 481; 1 Greenl. on Ev. § 523.) The Special Term had jurisdiction of the matter passed on by it. (2 R. S. 91, § 37.) It was one of the questions for the court to decide whether the report of the referee was proper and authorized by the law under which he was appointed, and the motion to confirm might properly have been opposed on this ground upon the report itself and without making a case. (*Goddling v. Porter*, 17 Abb. Pr. 374.) The rights of Mrs. Lockwood as against the individual creditors of Mr. Gray were thus regularly before the Supreme Court for its determination. (*Fisher v. Hepburn*, 48 N. Y. 41; *Wilcox v. Jackson*, 13 Peters, 511; *Bangs v. Duckinfield*, 18 N. Y. 592, 597; *In re Canal and Walker Streets*, 12 id. 406; *Judson v. Rossie Galena Co.*, 9 Pai. 600.) Where the plaintiff can prove the insolvency of the survivor and thus show that he has no legal remedy for the collection of his debt against him, he may proceed to enforce payment from the estate of a deceased partner or other joint debtor without bringing an action against the survivor. (*Pope v. Cole*, 55 N. Y. 129; *Forbes v. Childs*, 17 id. 354; *Richter v. Poppenhusen*, 42 id. 373.) Mrs. Lockwood had a right to share as an individual creditor of Mr. Gray as to the \$2,000 note, irre-

Opinion of the Court, per ANDREWS, J.

spective of the effect to be given to the judgment of the Supreme Court. (*Wilder v. Keeler*, 3 Paige, 167; *Meech v. Allen*, 17 N. Y. 300, 301; *Stewart's Case*, 4 Bradf. 254.) Mrs. Lockwood, the surety, upon payment of the notes, was subrogated to all the rights of the original holder. (*Cuyler v. Ensworth*, 6 Paige, 32; *Speiglemeyer v. Crawford*, 6 id. 254; *Clason v. Morris*, 10 Johns. 525, 601; *Hays v. Ward*, 4 Johns. Ch. 130; *Matthews v. Aiken*, 1 Com. 595; *Lewis v. Palmer*, 28 N. Y. 271; *Goodyear v. Watson*, 14 Barb. 481; *Alden v. Clark*, 11 Hun, 209; *Townsend v. White*, 75 N. Y. 425; *White and Tudor's Lead. Cas. in Eq.* [4th ed.] 137; *Watts v. Kinney*, 3 Leigh. 272, 294; *Powell v. White*, 11 id. 309; *Wheadey v. Calhoun*, 12 id. 265, 274; *Lidderdale v. Robinson*, 12 Wheat. 594; *Cheeseborough v. Millard*, 1 Johns. Ch. 409, 413; *Hines v. Keeler*, 3 W. & S. 404, 491; *U. S. v. Hunter*, 5 Pet. 174.)

ANDREWS, J. It is conceded that the right of Mrs. Lockwood to share in the distribution of the assets of the estate of Charles B. Gray, in the hands of his administrator, is governed by the rules by which courts of equity are guided in distributing the separate estate of an insolvent, as between his separate creditors and the creditors of a copartnership of which he was a member. The general rule in such cases is that the separate creditors are entitled to be first paid, on the ground that their debts were contracted on the credit of the separate estate, while partnership debts are contracted primarily on the credit of the joint estate. But as a partnership debt is regarded in equity as both joint and several, there is an apparent inconsistency in excluding in equity the right of the partnership creditor to share with the separate creditor, where, as in this case, there is no joint estate and the surviving partner is insolvent. But the doctrine stated is the settled law of this state, and is not open to question. The main debt of Mrs. Lockwood never in form, at least, was the copartnership debt of Gray and Lockwood. In February, 1875, Gray and Lockwood, in their individual names, and not in the

Opinion of the Court, per ANDREWS, J.

name of the firm, executed, together with Mrs. Lockwood, their joint and several promissory note for \$2,000, payable to one Farnum, in consideration of a loan for that amount made by the payee to Gray and Lockwood at that date. Mrs. Lockwood signed the note at the request of the other makers for their accommodation, and as between themselves she was a surety merely. She was subsequently compelled to pay the note, which is the foundation of her principal claim against the estate. It is found that the money was procured for the use of the firm of Gray & Lockwood, and was used in the firm business, and that this was known to all the parties. Upon these facts is it a conclusion of law that the debt represented by the note was a firm debt, or that the claim of Mrs. Lockwood is to be ranked on the distribution of the separate estate of the decedent as a firm debt and excluded from participation until the concededly separate debts are paid? We are of opinion that no rule of marshaling assets requires such a determination. The payee of the note had a right to prescribe the security which he would accept for the loan. He chose to take the joint and several individual note of the parties, with the name of Mrs. Lockwood added. By the contract it was made the several debt of each of the makers, and we perceive no ground, in abstract justice, why Farnum, or his successor in interest, cannot have the benefit of the security according to its terms, and the right to prove the debt against the separate estate of the decedent, and share equally with the other separate creditors in the distribution. The fact that he knew that the money was borrowed for the use of the firm makes, we think, no difference. If he had required separate security by mortgage, or otherwise, on the individual property of one of the firm, there could be no doubt that it would be valid against the separate creditors of the individual partner, notwithstanding he knew for what purpose the money was borrowed. (*Meech v. Allen*, 17 N. Y. 300.) It is plain that Mrs. Lockwood has the same equity that Farnum would have had if he still owned the note and presented it as a claim against the

Statement of case.

estate of Gray. He did not lend the money on the credit of the firm, or on the firm obligation, but on the joint and several promise of the individuals who composed it, and of Mrs. Lockwood. We need not consider whether he could have proved it in bankruptcy as a firm debt on showing the circumstances. This has not been done and there can be no question of election as between the joint and separate estate, as there is no joint estate. We think the authorities sustain the view above stated and show that the debt of Mrs. Lockwood for the money paid in discharge of her obligation on the note was provable and entitled her to share *pro rata* with the other separate creditors of the decedent in the distribution. (*Wilder v. Keeler*, 3 Paige, 167; *Morris v. Morris*, 4 Grat. 293; *Ex parte Rowlandson*, 3 P. Wms. 405; *Ex parte Bond*, 1 Atk. 98; *Ex parte Honey*, L. R., 7 Ch. App. 178; 2 Lindley on Part. 1095, 1232, 1245, note.) The conclusion we have reached on the main question makes it unnecessary to consider the other questions. It follows that the order should be affirmed and judgment absolute rendered for the respondent on the stipulation.

All concur.

Order affirmed and judgment accordingly.

In the Matter of the Judicial Settlement of the Accounts of
ANN MATILDA PIFFARD et al., as Executors, etc., of DAVID
PIFFARD, Deceased.

The will of P. gave to his daughter S. one-fifth of all his real and personal estate. By a codicil he directed that S. should have power by her will, "heretofore or hereafter" executed, to dispose of the share devised and bequeathed to her, and to that end he directed that such share should be paid over by his executors to the executors or trustees named in her will in case of her death during his lifetime, but in case she survived, then that such share should be paid over to her. S. died before the testator leaving a will. *Held*, that while the testator gave a power of appointment, which as a power the donee could not execute during the donor's lifetime, yet the further language of the codicil showed the testator's intent to be, in case of the happening of the contingency specified, to devise and bequeath by force of his own will the daughter's

Statement of case.

one-fifth to such person or persons and in such shares and proportions as she had directed or should direct in the disposition of her own property; that the will of the daughter could be referred to to define and make certain the persons to whom and the proportions in which the one-fifth should pass; and that the executors of the will of P. were properly required to pay over that share to the executors of the will of S. for the purposes of distribution.

(Argued October 22, 1888; decided November 27, 1888.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 22, 1886, which affirmed, so far as appealed from, a decree of the surrogate of the county of Livingston on settlement of the accounts of the executors of the will of David Piffard. (Reported below, 42 Hun, 34.)

The provisions of the will, so far as material, are set forth in the opinion. The testator's daughter, Sarah Eyre Piffard, one of the beneficiaries named therein, died before the testator, leaving a will. The executors under a power of sale contained in the will sold the real estate; the portion of the decree appealed from directed said executors to pay over to the executors of the will of said daughter Sarah the share given her.

John R. Strang for appellants. The powers created, defined and regulated by 1 Revised Statutes 737, section 126, are in terms confined to "lands," but are now held applicable to personal property also. (*Cutting v. Cutting*, 86 N. Y. 522; *Hutton v. Benkard*, 92 id. 296.) There is no reference in the will of Sarah Eyre Piffard to the power, nor to the fund which is the subject of the power, and there is nothing in it from which any intent to execute the power can be inferred. (*Winchell v. Hicks*, 33 N. Y. 383.) It cannot be presumed that the testator's daughter intended to execute a power, of the existence of which she was ignorant, and which had no possible legal existence or operation until nearly three years after her will was made and two years after

Statement of case.

her own death. (*Jones v. Southall*, 32 Beav. 31, 38.) The intent to execute or not to execute the power of appointment must be gathered from the terms of the will and the circumstances surrounding it, like any other question of the testator's intent arising upon the construction of a will. (*Hutton v. Benkard*, 92 N. Y. 295, 301; *White v. Hicks*, 33 id. 383; *Wildbue v. Gregory*, 12 Law Rep. § 1482; 1 Jarman on Wills [5th Am. ed.] 676, note 1; Sugden on Powers [1st Am. ed.] 332; 2 Williams on Ex. [6th Am. ed.] 1212; *Jones v. Southall*, 32 Beav. 31, 38; *Quinn v. Hardenbrook*, 54 N. Y. 83, 89.) There must be an expression of an intent to make an independent bequest to the executors, in case of the death of the legatee, to prevent a lapse. (1 Roper on Legacies [2d Am. ed.] 466; *Thurber v. Chambers*, 66 N. Y. 42; *Bolles v. Bacon*, 3 Dem. 43.)

Francis H. Wilson for Emma M. Piffard, respondent. The testator's intention to dispose of all his property should be carried into effect, if that can be legally done by any reasonable mode of interpretation, and the court will prefer that interpretation which prevents either a total or a partial intestacy. (*Vernon v. Vernon*, 53 N. Y. 351.) The power conferred on Sarah Eyre Piffard, by her father's will, was executed by her will. (1 Jarman on Wills [Bigelow's ed.] 676, note 1; *White v. Hicks*, 33 N. Y. 383; *Hutton v. Benkard*, 92 id. 296; *Cutting v. Cutting*, 86 id. 522.) It became effectual at his death to vest rights that were inchoate at the time of her death. (1 R. S. 732, §§ 77-79.) The direction in the testator's will that his executors pay over to his daughter's executors this fifth share of his estate, violates no rule of law, and may operate as a gift to her estate without the execution of a power. (*Brown v. Clark*, 77 N. Y. 369, 375.)

George F. Yeoman for executors, etc., of Sarah Eyre Piffard, respondents. The will of Sarah Eyre Piffard was, in form, sufficient to dispose of all of the property that she had

Opinion of the Court, per FINCH, J.

power to dispose of, whether it was or was not her own property. (1 R. S. 737, § 126; *Hutton v. Benkard*, 92 N. Y. 295, 304.) The fact that after, and in consequence of her death, David Piffard executed a codicil confirming the will and all former codicils, operated as a re-execution of them all. (*Brown v. Clark*, 77 N. Y. 369; Redf. on Surrogates [3d ed.], 227; 1 Jarman on Wills [R. & T. ed.], 28.) If two modes of interpreting a will are possible, that mode will be preferred which will prevent either a total or a partial intestacy. (Redf. on Surrogates, 255; *Vernon v. Vernon*, 53 N. Y. 351; *Lyman v. Lyman*, 22 Hun, 261.) Where the intention is plain upon the whole will, it is the duty of the court to subordinate the language to the intention. (*Philips v. Davies*, 92 N. Y. 199; *Wagner v. Wagner*, 96 id. 164; Redf. on Surrogates, 251.) If the will of Sarah Eyre Piffard did not bequeath this property, the will of David Piffard did bequeath it to those who are entitled, under her will, to her property. (*Chamberlain v. Hutchinson*, 22 Beav. 444; *Brickenden v. Williams*, L. R., 7 Eq. 309.)

FINCH, J. The testator, by his last will, duly executed, gave to his daughter, Sarah, one-fifth of all his real and personal property. The devise and bequest was absolute and without condition, and such as to vest in her a complete title to the property given. Of course such legatee and devisee, if she lived until her father's will took effect, would have the absolute ownership and power of disposition, and could transfer it by will to whomsoever she pleased. By a codicil made a few years later, the testator again referred to the devise and bequest to Sarah, and made a further provision relative thereto. It reads thus: "I do hereby direct that my said daughters, Sarah Eyre Piffard and Ann Matilda Piffard, named in my said will, shall have power, by their several wills heretofore or hereafter duly made and executed, to dispose of, devise and bequeath the share of my estate devised and bequeathed to them severally in and by my said will; and to that end I direct that such share or shares shall be paid

Opinion of the Court, per FINCH, J.

over by my said executors to the executors or trustees named in and by the several wills of my said daughters in case of the death of them, or either of them, in my lifetime, instead of to my said daughter or daughters; but if my said daughters shall survive me, then such shares shall be paid to them severally, as now provided in and by my said will." It seems to me impossible to misunderstand the purpose of this provision.

It was clearly intended to reach and cover a contingency which has actually occurred, and to prevent a lapse of the legacies by the death of a daughter in the testator's lifetime. To that event the provision of the codicil was confined, and only in that event could it be consistent with the absolute devise and bequest and essential to make it effectual. And while, to reach this result, the testator gave a power of appointment, which, as a power, the donee could not execute in her father's lifetime, because she could not herself dispose of what remained wholly in another's power and ownership, yet the further language of the codicil shows its intent to be that, in case of the death of the daughter in the lifetime of the father, the latter intended to devise and bequeath by force of his own will the daughter's one-fifth to such person or persons and in such shares and proportions as by an existing will, made before or after the date of the codicil, she had determined and directed or should determine and direct in the disposition of her own property; and "to that end," in aid of that result, he explicitly declares that the one-fifth given to her shall be paid over to her executors for the evident purpose of passing to her devisees and legatees that share precisely as if it had been her property at her death, and had become distributable as such by force of her will. And this view is very greatly strengthened by the fact that after her death leaving a last will, the testator, with full knowledge of the existing situation, made two other codicils, confirming his will and the provisions contained in it now in question.

While, therefore, it may not be possible to sustain the power of appointment as such, and so enable Sarah's devisees and legatees to take the one-fifth by force of her will, it is

Statement of case.

possible to see in the will of the father a clear intent to prevent a lapse and avoid a partial intestacy by carrying over the one-fifth which she did not take, through her executors, to those whom she should name as devisees and legatees of her property, and in the proportions by her directed. Her will, therefore, is referred to, not as transferring the property by an appointment, but to define and make certain the persons to whom and the proportions in which the one-fifth should pass by the father's will in case of the death of the daughter in his lifetime. What she would have done by her will but could not, that he did for her by his own will.

This was the construction adopted by the General Term, and we concur in it.

The judgment should be affirmed.

All concur.

Judgment affirmed.

JOHN MERRY, Appellant, v. LOUIS HOOPES et al., Executors, etc.,
Respondents.

Where, upon the dissolution of a firm, one of the copartners purchases and succeeds to the business, the exclusive right to use trade-marks belonging to the firm passes to the purchaser, although no express mention is made of them in the deed of assignment.

Huer v. Dannenhoffer (82 N. Y. 499) and *Hazard v. Caswell* (93 id. 259) distinguished.

(Argued October 22, 1888; decided November 27, 1888.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made July 2, 1886, which affirmed a judgment in favor of Evan T. Hoopes, the original defendant, the present defendants' testator, entered upon the report of a decision of the court on trial at Special Term.

This action was brought to restrain the use by the original defendant of certain brands claimed by plaintiff to be trade-marks, to which he claimed an exclusive right.

Statement of case.

The original partners were formerly partners engaged in the business of manufacturing galvanized iron. The brands in question were used by them ; one consisted of the figure of a lion couchant with the words, " Lion Brand ;" the other the figure of a phoenix with the words, " Phoenix Brand." At the time of the dissolution of the firm the parties executed an instrument, of which the following is a copy :

" Agreement, made this first day of February, 1884, between Evan T. Hoopes, of the city of New York, and John Merry, of the same place, witnesseth :

" That the copartnership heretofore existing between said Hoopes and Merry is hereby dissolved upon the following terms :

" *First.* Said Hoopes shall, upon the execution of this agreement, receive of the partnership funds and property the sum of forty-five hundred dollars in cash, also notes of customers of Hoopes & Merry, now held by said firm, indorsed by Hoopes & Merry, to the amount of seventy-five hundred dollars, and all interest on said notes is to be allowed to said Hoopes ; also said Hoopes is to receive notes by said Merry to the order of said Hoopes to the amount of five thousand dollars, to wit, three notes, payable in six, nine and twelve months, respectively, from this date, with interest ; also said Hoopes is to receive and said Merry is to deliver to him merchandise of the value of five thousand dollars, to be delivered as selected by said Hoopes, and at prices agreed upon as per memorandum signed by said Merry this day, and delivered simultaneously herewith ; all of said merchandise to be delivered on or before May 15, 1884.

" *Second.* Said Hoopes & Merry are to assign the existing lease of the premises north side of Fifteenth street, between Tenth and Eleventh avenues, heretofore occupied by said firm, to Evan T. Hoopes, and thereupon said Hoopes is to execute a lease of said premises to said Merry for the period of twenty-seven months from the first day of February, 1884, at the monthly rent of six hundred and fifty dollars, payable monthly ; which said Merry agrees to pay ; and said Hoopes

Statement of case.

is to execute also a lease to said Merry, for the same period aforesaid, of the plant belonging to the business of said firm, as specified in memorandum annexed, including office fixtures, horses and wagons, for the sum of one dollar, with a proviso, that on default of compliance by said Merry with the terms of the lease of said premises, the lease of the plant shall terminate, and said Hoopes may thereupon take possession of all said plant, said Merry to deliver the same to him undiminished.

"*Third.* Upon expiration of said term, said leases having been complied with, and all indebtedness of said Merry to said Hoopes, arising from the foregoing provisions of this agreement having been paid, said Hoopes shall execute and deliver to said Merry a bill of sale, conveying to said Merry all said plant for the sum of one thousand dollars, which said Merry shall pay therefor.

"*Fourth.* Said Merry is to succeed to and assume all the liabilities of the firm of Hoopes & Merry.

"*Fifth.* Said Merry agrees to pay said Hoopes the sum of six hundred and fifty dollars monthly, on the last secular day of each month, for the period of twenty-seven months, from the 1st day of February, 1884, and said payments shall be credited, when made, on the rent reserved in said lease of said premises; but if said lease shall be hereafter annulled, it shall not affect the covenant herein for payment of said monthly sums, but said covenant shall remain binding, notwithstanding said lease may be annulled, it being a part of the consideration of this agreement that said Merry shall pay to said Hoopes the sum of seventeen thousand five hundred and fifty dollars in installments of six hundred and fifty dollars monthly.

"*Sixth.* If said Hoopes should neglect to pay to his landlord the rent of said premises within five days after the same is due, said Merry may pay any such rent so neglected to be paid by said Hoopes, and charge the same to Hoopes' account.

"*Seventh.* If the premises shall be destroyed by fire, so that, by the terms of said lease the rent ceases, then said Merry shall be entitled to deduct from the said monthly payments, herein-

Statement of case.

before provided, thereafter becoming due, the sum of one hundred and eighty-three $\frac{33}{100}$ dollars, and said Merry shall be entitled to a like reduction in case, for any reason, rent should cease to be payable under the lease heretofore existing, made by Bradish Johnson to Hoopes & Merry, on said premises, this day assigned to Hoopes.

"Witness our hands and seals the day and year first above written.

"EVAN T. HOOPES. [SEAL.]

"JOHN MERRY. [SEAL.]"

Another paper was signed by the parties headed "Plant Account." Among the articles enumerated therein were "stencil plates." These were the plates with which the brands in question were painted on the goods manufactured.

The stipulations as to the assignment of the firm lease and the execution of a new lease to plaintiff were carried out, and he continued the business. Hoopes soon after commenced and carried on the same business, using similar brands.

The further material facts are stated in the opinion.

Alexander N. Campbell for appellant. The marks or brands in question are trade-marks, and were the exclusive property of John Merry & Co., the moment that firm put them upon merchandise of its own manufacture. (*Amoskeag Man. Co. v. Spear*, 2 Sandf. 615; *Browne's Trade-Marks*, § 54; *Upton's Trade-Marks*, 9, 46; *Man. Co. v. Trainer*, 101 U. S. 53, § 3; *Congress & Empire Spring Co. v. High Rock Congress Spring Co.*, 57 Barb. 538.) The marks passed to the assignee, Payne, by the general assignment. (*Burrill on Assignments*, 149, § 100; *Mass. Gen. Stat.*, chap. 118 § 44; *Kidd v. Johnson*, 100 U. S. 620; 1 N. Y. Monthly Law Bulletin, 47; *Browne's Trade-Marks*, 354, 355; *Brennan v. Wilson*, 11 N. Y. 502.) Hoopes obtained as good title to the trade-mark as to any asset conveyed to him by the assignee. (*Upton's Trade-Marks*, 81; *Pine v. Rikert*, 21 Barb. 469.) At dissolution of the firm of Hoopes & Merry, John Merry acquired absolute and exclusive ownership in the

Statement of case.

trade-marks. (*Kellogg v. Totten*, 19 Abb. Pr. 40; *Browne on Trade Marks*, 61; *Shipwright v. Clements*, 19 W. R. 599.) Hoopes, by using the trade-marks, after the dissolution, wronged both the plaintiff and the public. (*Perry v. Truëfitt*, 6 Beav. 66; *Boardman v. Meridan Britannia Co.*, 35 Conn. 402; *Newman v. Alvord*, 51 N. Y. 189; *Sedon v. Senate*, 1811 Rolls Court; *Edeh on Injunctions* [1st Am. ed.], 226; *Braham v. Bustard*, 9 Law Times [N. S.] 199; *Coates v. Holbrook*, 2 Sandf. Ch. 586; *Cook v. Starkweather*, 13 Abb. [N. S.] 392; *G. & H. Mfg. Co. v. Hall*, 61 N. Y. 226; *Petersen v. Humphrey*, 4 Abb. Pr. 396; *Lee v. Haley*, 18 Week. Rep. 342.)

Jefferson Clark for respondents. If the marks in question are trade-marks, they were transferred by the general assignment made by John Merry & Co. to Cornelius B. Payne. (*Hegeman v. Hegeman*, 8 Daly, 1; *In re Sweezy*, 62 How. Pr. 215; 64 id. 353; *In re Know*, 1 Mon. Law Bul. 47; *Bury v. Bedford*, 4 De G., J. & S. 352; *Hudson v. Osborne*, 21 L. T. [N. S.] 386; *Edleston v. Vick*, 23 Eng. L. and E. 51.) Failure to give bond or file schedules did not invalidate the assignment. (*Brennan v. Wilson*, 71 N. Y. 502.) The transfer by Payne to Hoopes was valid, at least as to plaintiff, notwithstanding the failure of the assignee to qualify, for it was a *bona fide* sale for value in which the plaintiff acquiesced, and which he, by his subsequent acts, affirmed. (*Pine v. Rikert*, 21 Barb. 469; *Sheldon v. Stryker*, 42 id. 284.) Hoopes thus became the owner of the marks, if they were trade-marks, and Merry reacquired an interest in them only by the formation of the firm of Hoopes & Merry. (*Huwer v. Dannenhoffer*, 82 N. Y. 499; *Hazard v. Caswell*, 93 id. 259.) The marks in question do not constitute trade-marks. Plaintiff simply adopts a different mode of designating the qualities by the figures of the lion and phoenix. The marks only indicate kinds and qualities of iron, and no property in such marks or devices can be acquired. (*Stokes v. Landgraff*, 17 Barb. 608; *Royal Baking Powder Co. v. Sherrill*, 93 N. Y. 331.)

Opinion of the Court, per PECKHAM, J.

PECKHAM, J. If the brands in question were trade-marks, so that they indicated that the iron upon which they were placed was of the manufacture of the plaintiff, or of the firm of which he had been a member, or that it had been galvanized by him or his firm, or specially sold by him or them, we think the right to exclusively use them on iron galvanized by the plaintiff, passed to him by virtue of the written papers signed by the parties at the time of the dissolution.

They were brands which had been designed by the plaintiff while a member of the firm of John Merry & Co., and had been used by that firm, and we think had passed to the firm composed of the plaintiff and the defendants' testator. Although the words "good will" were not mentioned in the papers (other than in Exhibit F., which was not signed by the parties, and which the defendant does not recollect even to have seen), yet it is evident, from an inspection of the papers which were signed by him, that it was meant to pass, and when defendant denies it he merely denies a conclusion of law, as the intention to pass it is derived from the documents signed by the parties. In *Shipwright v. Clements* (19 W. R. 599), MALINS, V. C., held, that where a business was sold the entire good will and right to use trade-marks pass to the purchaser, without any express mention of them being made in the deed of assignment. (See, also, *Hudson v. Osborne*, 18 W. R., Ch. Dig. 44, paragraph 15; *S. C.*, 39 L. J. R. [N. S.] 79.) The effect of the transaction between the parties, as evidenced in the papers executed by them, was a sale of the business, its good will and its trade-marks to the plaintiff by the defendants' testator. All the liabilities of the late firm were assumed by the plaintiff, and he was to succeed it in the same business and at the same place, and for this purpose the defendants' testator assigned the lease of the premises to plaintiff, and, in substance, sold the plant to him, and among the articles of property contained in the inventory of such plant were stencil plates which made the brands. The agreement of dissolution specified exactly what the defend-

Opinion of the Court, per PECKHAM, J.

ant was to have from the firm, and the good will was not there included, nor any marks or brands, nor was defendant to succeed to the business, or any part thereof, and what the defendant did not take it was meant the plaintiff should have. After the dissolution it was found as a fact by the court, that both parties engaged in the business of dealing in galvanized iron in New York, and both parties used these brands, the plaintiff upon iron galvanized by him, and the defendant upon iron galvanized for him by other parties, pursuant to his order.

The court found as a conclusion of law that the plaintiff never acquired and never had the exclusive right to use these marks, and that the defendant had the same right which plaintiff had to their use.

There is no express finding that these brands were trademarks, and the evidence on the subject is contradictory.

The plaintiff testifies to a state of facts which would leave no doubt that they indicated that the iron upon which they were found was not alone of a certain quality, but that it had been galvanized by the plaintiff, or by a firm of which he was a member, and that such iron thus galvanized had a large sale through the country. and the brands were valuable as a trade-mark.

But the defendant, on the contrary, testified in so many words that the brands indicated nothing of the sort; that they simply indicated that the iron itself upon which they were found was iron of the first or second quality (according to the brand which was used), and did not in any way indicate or represent that the plaintiff or any other special person or firm had manufactured or galvanized it, or that the galvanizing was of any particular quality; that if the words, "best bloom iron" had been used in the one case, and "good second quality charcoal iron" had been used in the other, all the information would have been imparted to those in the trade that they would have acquired from seeing these brands upon the iron; that it was simply a short way to describe the original quality of the iron which had been subjected to the galvanizing process,

Opinion of the Court, per PECKHAM, J.

and the iron itself was not manufactured by plaintiff, nor had he any connection with its manufacture.

If the brands had only this meaning and significance, it is plain that the plaintiff would have no right to prevent the defendants from using them, for the exclusive right to use them would not pass as part of the good will or as a trade-mark; while, if the plaintiff's contention were true, it is equally plain, upon our construction of the dissolution articles, that he would have such right. The court, upon this, and several other questions, was requested to find in accordance with the plaintiff's contention, and refused to do so, "except so far as they (the requests) are covered by the findings signed on application of defendants."

There is no express and separate finding on this subject signed by the court on application of defendants, or at all. But upon the fact (with others) found by the court that "no mention was made of any trade-mark in any of the papers executed by said parties upon the dissolution of said firm, and that neither partner expressly conveyed to the other any right to the use of any marks or brands," the court found as a conclusion of law that the plaintiff never acquired and never had the exclusive right to the use of the marks or brands aforesaid, and that the defendants had the same right which plaintiff had to use such brands or marks.

The result of the finding of the court and its conclusion of law is that, assuming these marks to be a trade-mark, there is no evidence of an exclusive right to its use by plaintiff, and for that reason the complaint was dismissed. Although it did refuse to find the facts as to the trade-mark when specially asked so to do by the plaintiff, other than as was contained in the findings for defendants, yet the finding of fact which it did make for defendants and the conclusion of law therefrom, render it clear that the court assumed the fact as existing (and in the above seventh finding so treated it), that the brands were trade-marks, although still deciding that the right to their exclusive use did not rest with the plaintiff.

In this we think there was error, and the exception to the con-

Statement of case.

clusion of law reaches it. Upon a new trial it can be plainly discussed and the facts found one way or the other upon which the question depends whether these brands were trade-marks or were mere labels indicative of the quality of iron upon which the galvanizing process had been performed.

The cases of *Huwer v. Dannenhoffer* (82 N. Y. 499), and *Hazard v. Caswell* (93 id. 259), are not in conflict with the decision of this case. They simply hold that a trade-mark used by a firm is an asset of the firm, and upon a dissolution each partner has the right to use it unless he has vested the other with an exclusive right to do so, and that it is incumbent upon the partner who claims such exclusive right to prove himself vested with it.

In this case we hold that if these were trade-marks then the plaintiff has proved such exclusive right, so far as the facts are now presented.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

All concur.

Judgment reversed.

ELIZABETH W. GREENWOOD, Individually and as Executrix, etc., Respondent, v. ELIZABETH S. MARVIN, Individually and as Executrix, etc., Appellant.

Real estate purchased by a firm with its funds for partnership purposes is regarded in equity, so far as the firm and its creditors are concerned and so long as the partnership affairs remain unsettled, as personal property. The interests of the respective members of the firm therein are not required to be established by deed or instrument in writing.

The creation of trusts as to such interests is not prohibited by the statute of uses and trusts.

It seems that after the dissolution of the firm, and after the claims of creditors are discharged and the equities of the respective partners in its assets determined and satisfied, such property, so far as it is preserved in specie and is awarded or conveyed to the respective members, loses its character of personal property and again becomes subject to the rule governing the devolution of real estate.

The question as to whether real estate is partnership property may be

Statement of case.

determined on parol evidence, independent of the particular form which the transaction took or the name in which the title was taken.

Where an agreement is made between two partners for the purpose of hindering and delaying the creditors of one of them, by which the legal title to the firm property is transferred to the other, it is competent for them, in the absence of any interference by creditors, to rescind it at any time and to restore to each, a legal interest in the property.

One of two copartners, by an instrument in writing, conveyed to G., plaintiff's testator, "all of the property, both real, personal and mixed, owned by him in partnership." G. executed to his assignor an instrument in writing declaring, in substance, that he held the property and its net proceeds in trust for the assignor. The title to certain real estate which had been purchased and paid for by the partnership and for the purposes of its business, was held in the name of the other partner. *Held*, that the assignee could maintain an action for a dissolution of the partnership, a conversion of its assets into money, payment of firm debts, and an accounting between the copartners and determination of their respective interests in any residue of such property; that the assignment conveyed no present interest in specific articles of property, but simply gave the assignee power to procure its conversion into money and the distribution of any residue after payment of firm debts and adjustment of partnership equities in whatever form it might exist; that the assignment, therefore, was not void as being a transfer of real estate in trust for the grantor, but the right transferred was a mere chose in action, subject in respect to its mode of transfer to the rules regulating the disposition of personal property. (Code of Civil Pro. § 1910.)

In the complaint it was alleged that the real estate so held in the name of the other partner was purchased by and belonged to the firm. *Held*, that the averments as to the character of the assets were not improper, but were unnecessary; that the question of the ownership of the real estate was merely incidental to the main object of the action and would have arisen on the accounting if it had not been mentioned in the pleadings.

Also, *held*, that in any event the transfer was valid as against the assignor, and he having been made a party defendant to the action, was bound by any adjudication, and that the copartner or his personal representatives had no such interest in the question as allowed them to contest the validity of the assignment.

Also, *held*, that the right of the present plaintiff to continue the action upon the death of G. was adjudicated by the order substituting her as plaintiff, and could not be raised on appeal from the judgment.

(Argued October 23, 1888; decided November 27, 1888.)

APPEAL by defendants, the executors of George L. Marvin, from an order of the General Term of the Supreme Court in

Statement of case.

the fifth judicial department, made October 21, 1887, which denied a motion for a new trial made under section 1001 of the Code of Civil Procedure upon exceptions after entry of an interlocutory judgment herein.

The nature of the action and the facts, so far as material, are stated in the opinion.

George Wadsworth for Percy L. Marvin, appellant. Real estate purchased for partnership purposes, and appropriated to those purposes, and paid for by partnership funds, becomes partnership property. (Parsons on Partnership, 363, chap. 11, § 2; *Fairchild v. Fairchild*, 64 N. Y. 471, 477.) It was not one of the purposes of the partnership to deal in real estate. (*Chester v. Dickerson*, 54 N. Y. 1) The land was not appropriated to partnership uses. (*Smith v. Jackson*, 2 Edw. Ch. 28; *Thompson v. Bowman*, 6 Wall. 317.) As the plaintiff has not shown that the land was bought for partnership use, or applied to such use, or paid for with partnership funds, it was not firm property, and Le Grand Marvin had no interest in it. (*Buckner v. Summer*, 2 Barb. Ch. 165; *Collumb v. Read*, 24 N. Y. 505; *Fairchild v. Fairchild*, 64 id. 471; *Buckley v. Buckley*, 11 Barb. 43; *Thompson v. Bowman*, 6 Wall. 317) The copartnership agreement of August 6, 1852, does not create any estate in these lands in Le Grand Marvin, nor give him any title thereto, or interest therein. (*Morrison v. Atwell*, 9 Bosw. 503, 510, 513.) When a copartner buys lands and takes the title to himself alone, no presumption arises that the lands are partnership property or assets. (*Ferris v. Van Vechten*, 73 N. Y. 113; Pomeroy's Eq. Jur. § 422.) The judgment and proceedings in the action of George H. Marvin against Le Grand and George L. Marvin, is not *res adjudicata* of the ownership of the land in question as between these parties. (*McKnight v. Baker*, 1 How. 201; *Tracy v. Tucker*, 7 id. 327; *Case v. Reeve*, 14 Johns. 79, 81; *Griswold v. Jackson*, 2 Edw. Ch. 460, 466; *Marvin v. Marvin*, 78 N. Y. 541, 542; *Brown v. Brown*, 2 E. D. Smith,

Statement of case.

153; *Brennan v. Blath*, 3 Daly, 478; *Lucas v. E. S. Glass Co.*, 38 Hun, 581, 585; *Campbell v. Hall*, 16 N. Y. 575; *F. & C. Bk. of L. I. v. Sherman*, 33 id. 69; *Campbell v. Consalus*, 25 id. 613; *Barth v. Burt*, 17 Abb. Pr. 349; 3 R. S. [6th ed.] 899, § 11; *Pardee v. Van Aken*, 3 Barb. 534, 542; *Smart v. Bement*, 4 Abb. Ct. App. Dec. 253; *Bk. of Beloit v. Beale*, 7 Bosw. 611, 631; *Wadsworth v. Lyon*, 93 N. Y. 201; *Woodgate v. Fleet*, 9 Abb. Pr. 222, 238, 239; *Mathews v. Duryea*, 17 id. 256; 45 Barb. 69; *Baldwin v. Kimmel*, 1 Robt. 109; *N. F. Ins. Co. v. McKay*, 5 Abb. [N. S.] 445; *York v. Steele*, 50 Barb. 397; *McIntosh v. Town*, 49 id. 550; *Burwell v. Knight*, 51 id. 267; *Clemens v. Clemens*, 37 N. Y. 59; *Supervisors, etc. v. Budlong*, 51 Barb. 493; *Stowell v. Chamberlain*, 60 N. Y. 272; *Bissell v. Kellogg*, 60 Barb. 617; *Balmer v. Hussey*, 87 N. Y. 303; *Remington Paper Co. v. O'Dougherty*, 81 id. 474; *Webb v. Buckelow*, 82 id. 555; *Steuben Co. Bk. v. Alberger*, 61 How. 227; *Slater v. Truax*, 13 Week. Dig. 218.) Testimony of oral declarations or admissions of parties is always unreliable and of little value, especially when a long time has elapsed between the alleged making thereof and the testifying thereto. (Greenl. on Ev. [5th ed.] 123, § 96; *Law v. Merrill's*, 6 Wend. 268, 277; *Garrison v. Akin*, 2 Barb. 25, 27, 28.) The legal presumption is that George L. Marvin was the sole owner of this property. (*Bogardus v. Trinity Church*, 4 Sandf. Ch. 676.) The court can only consider plaintiff's rights as an individual and as executrix, and not as a trustee; she is not before the court in that capacity. (*Austin v. Munro*, 47 N. Y. 360.) Neither partner could bind the other to the purchase of real estate without the other's consent. (*Thompson v. Bowman*, 6 Wall. 316.) Where partners pay money on a business foreign to the partnership concerns, though with their joint funds, this is *pro tanto* a severance of their funds. (*Gould v. Gould*, 8 Cow. 168; 6 Wend. 263; *Smith v. Jackson*, 2 Edw. Ch. 28; *Coles v. Coles*, 15 Johns. 159; 3 R. S. [7th ed.] 2181, § 51; *Garfield v. Hatmaker*, 15 N. Y. 475.) Even if Le Grand Marvin's title to this real estate had been good, the

Statement of case.

plaintiff cannot maintain this action, because the trusts sought to be created in favor of Le Grand Marvin by Greenwood's declarations of trust are invalid and void. (3 R. S. [7th ed.] 2180, §§ 45, 49; Id. 2181, § 55; Id. 2182, §§ 58, 59, 73, 74, 76-79, 94; *Heermans v. Robertson*, 64 N. Y. 332; *Fellows v. Heermans*, 4 Lans. 230; *Downing v. Marshall*, 23 N. Y. 366; *Yates v. Yates*, 9 Barb. 324, 332, 340; *Maurice v. Maurice*, 43 N. Y. 303; *In re Hall*, 24 Hun, 153.) A power in trust is not beneficial merely because the trustee is to be compensated for his services. (*McDonough v. Loughlin*, 20 Barb. 238; *Corse v. Leggett*, 25 id. 389.) As all the duties enjoined upon Greenwood in regard to the lands could be discharged under a power, he took no estate. (*Tucker v. Tucker*, 5 N. Y. 408; *Heermans v. Robertson*, 64 id. 332.) Upon the death of Simon L. Greenwood the trust, then unexecuted, vested in the Supreme Court, and did not descend to his heirs, nor pass to his personal representatives; and the court has not appointed the plaintiff to execute the trust. (3 R. S. [7th ed.] 2183, § 68; *Hawley v. Ross*, 7 Paige, 103, 107; *Wells v. Wallace*, 2 Redf. 58; *Curtiss v. Smith*, 60 Barb. 9; *Fonda v. Penfield*, 56 id. 503; *Holden v. N. Y. & E. Bk.*, 72 N. Y. 286, 297.) Both trustees must act; a trustee cannot divest himself of title by renunciation, but only by order of the court. (3 R. S. [7th ed.] 2183, § 69; *Thatcher v. Cundee*, 3 Keyes, 157; 33 How. 145; *Ross v. Roberts*, 2 Hun, 90; *Dunning v. Ocean N. Bk.*, 6 Lans. 296; *Brennan v. Wilson*, 71 N. Y. 502; *Holden v. N. Y. & E. Bk.*, 72 id. 286, 297.) Although a trust of personalty is not within the statute of uses and trusts, and may be created by parol for any purpose not forbidden by law, delivery is necessary to pass the title and create the trusts. (*Gilman v. McArdle*, 99 N. Y. 451; *Stellheimer v. Stellheimer*, 2 N. Y. S. Rep. 358; *Meiggs v. Meiggs*, 15 Hun, 453; *Martin v. Funk*, 75 N. Y. 134; *Pierson v. Drexel*, 11 Abb. N. C. 150.) The trust was a mere passive trust; it really amounted to nothing; its object was not to create a trust in good faith, but to defeat Mrs. Le Grand Marvin's dower; "a mere passive trust" to hold property for another's

Statement of case.

use cannot exist in this state. (*Kittel v. Osborn*, 1 Hun, 613, 614.) Le Grand Marvin created the trust, or power in trust, and was himself the beneficiary, and there can be no power in trust without an appointee or beneficiary other than the donee of the power. (*F. T. & T. Co. v. Corral*, 5 Barb. 613, 616, 652, 653; *Fellows v. Heermans*, 4 Lans. 256, 257.) Even if the land in question was beneficially the property of Le Grand and George L. Marvin, as copartners, although the title was in George alone, that does not make it personal estate for any purpose. (*Fairchild v. Fairchild*, 64 N. Y. 477-479; *Buckley v. Buckley*, 11 Barb. 43; *In re Coddling*, 9 Fed. Rep. 849, note 851; 16 West. Jur. 194; *Savage v. Burnham*, 17 N. Y. 561.) The parties to the trust cannot now disavow their own acts and treat that as personalty which, in the creation of the trust and the devise of the trust estate, they called and treated as real estate. (*Reid v. Sprague*, 72 N. Y. 457; *Heermans v. Robertson*, 64 id. 332.) The conveyance by Le Grand Marvin to Greenwood is absolutely void, because, when it was made, the lands were in the actual possession of George L. Marvin, who claimed them under a title adverse to that of Le Grand. (3 R. S. [7th ed.] 2516, §§ 5, 6; *Webb v. Bindon*, 21 Wend. 98; *Howard v. Howard*, 17 Barb. 663; *Pepper v. Haight*, 20 id. 429.) The equitable conversion of partnership lands into personal property is not complete; it is limited to the payment of partnership debts, and to the settlement of partnership affairs; it does not extend to the devolution of the estates of the individual partners. (*Foster's Appeal*, 74 Penn. St. 391, 397; *Estate of McAvoy*, 12 Phila. 83; 3 Pom. Eq. Jur. 134, § 1166; *Bennett v. Rosenthal*, 11 Daly, 91, 94; *In re Coddling*, 9 Fed. Rep. 849, note 851; 16 West. Jur. 194.)

Spencer Clinton for Elizabeth S. Marvin, appellant. The plaintiff cannot maintain this action, for the reason that no title vested in her testator under the assignment from Le Grand Marvin. (3 R. S. [7th ed.] 2181, §§ 58, 59; Id. 2180, 2182.) Real estate belonging to a partnership for the purpose of paying the debts and adjusting the equities between the members

Statement of case.

of the firm, is treated as personal property, and what remains is considered and treated as real estate, which would go to the heirs of the partners according to their interest. (*Fairchild v. Fairchild*, 64 N. Y. 471, 479.) The primary trust in the partner holding the title is maintained by treating the realty as personalty, and he is thus prevented from defrauding his copartner. But it would not follow that the law will permit the lands to be the subject of another or secondary trust which would be void as a trust of real estate. (*Holmes v. Mead*, 52 N. Y. 332.) The court erred in holding that the question of these lands, being partnership assets, was *res adjudicata*. (*Stowell v. Chamberlain*, 60 N. Y. 272, 277; *Bell v. Merrifield*, 109 id. 203.)

Adelbert Moot for respondent. The real estate involved in this litigation was partnership property. (*Berkshire Woolen Co. v. Jullard*, 75 N. Y. 538; *Lawrence v. Fox*, 20 id. 299; *Little v. Banks*, 85 id. 258; *Fairchild v. Fairchild*, 64 id. 471; *Newton v. Hook*, 48 id. 675; *Village of Port Jervis v. Bank*, 96 id. 550; *Webb v. Buckelew*, 82 id. 555, 559; *Colins v. Bennett*, 46 id. 490; *Jarvis v. Driggs*, 69 id. 143; *Hallock v. Dominey*, 69 id. 340; *Fairchild v. Fairchild*, 5 Hun, 407; 67 N. Y. 471.) The consideration having been paid by the firm, there is a resulting trust by which, as a matter of law, George L. Marvin is held to have received and retained title to the property for the firm. (*Robbins v. Robbins*, 89 N. Y. 251, 258; 11 Pomeroy's Eq. Jur. 605, 609, §§ 1031, 1037, 1038; *McCartney v. Bostwick*, 32 N. Y. 58; 2 Pomeroy's Eq. Jur. 614, § 1042; 2 R. S. 728, §§ 45, 51; 3 R. S. [7th ed.] 2180, § 51; *Savage v. Burnham*, 17 N. Y. 561; 1 Abb. Ap. Cases, 253; *Fairchild v. Fairchild*, 64 N. Y. 471, 477, 479; 27 Alb. L. Jour. 185, note decision Ohio Sup. Ct.; *Smith v. Jackson*, 2 Edw. Ch. 28; *Collumb v. Reed*, 24 N. Y. 505; *Foot v. Bryant*, 44 id. 544; *Gilman v. Reddington*, 24 id. 12; *Gilman v. McArdle*, 99 id. 456; 2 Daniels on Neg. Instruments [3d ed.], § 1261, and notes.) The judgment in the action of *George H. Marvin v.*

Statement of case.

Le Grand Marvin and George L. Marvin, and the subsequent proceedings, are *res adjudicata* of the matter in controversy herein. (Freeman on Judgment, §§ 162-168, 174, 247, 249, 254-255; *Tuska v. O'Brien*, 68 N. Y. 446; *Peck v. Callagan*, 95 id. 73; *Leavitt v. Wolcott*, Id. 212; *Village of Port Jervis v. First Nat. Bk.*, 96 N. Y. 550; Abb. Trial Ev. 826-834; *Osterhout v. Rigney*, 98 N. Y. 223; *Hyland v. Baxter*, Id. 610; *Pray v. Hegeman*, Id. 351; *Murray v. Berdell*, Id. 480; *Lorillard v. Clyde*, 102 id. 59; *Griffin v. L. I. R. R. Co.*, Id. 449; *Carpenter v. Osborn*, Id. 552; *Milne v. Deen*, 7 Sup. Ct. Rep. 106, 107.) Defendants are privy in estate to George L. Marvin, and hence estopped by the judgment. (*Buchan v. Van Zandt*, 7 N. Y. 523; *Port Jervis v. First Nat. Bk.*, 96 id. 550; *Leavitt v. Wolcott*, 95 id. 212.) The law pronounces the undisputed and unexplained documentary evidence of plaintiff conclusive evidence that the lands in question were lands of the firm, hence the mere deed to George L. Marvin gives him no title except in trust for the firm. (*Dyer v. Clark*, 5 Met. 581; *Foote v. Bryant*, 47 N. Y. 544; *Mattock v. Mattock*, 5 Ind. 403; *Buchan v. Sumner*, 2 Barb. Ch. 165, 200; *Coster v. Clark*, 3 Edw. Ch. 428, *Fairchild v. Fairchild*, 64 N. Y. 471, 477; *Traphagen v. Burt*, 67 id. 30) Elizabeth S. Marvin is only entitled to dower in that portion of her husband's share of the property involved which shall remain after settling his partnership affairs and the accounts as between the partners. (Code, § 488, sub. 4; *Groschen v. Traders' Nat. Bk.*, 12 Hun, 149; *Treviss v. Myers*, 67 N. Y. 542; *Mattock v. Mattock*, 5 Ind. 403.) This action is well brought and can be maintained. (Story on Partnership [7th ed.] §§ 307, 308, note 1; *Marquand v. N. Y. Mfg. Co.*, 17 Johns. 525; *Morss v. Gleason*, 64 N. Y. 204; *Staats v. Bristow*, 73 id. 264; *Tarbell v. West*, 86 id. 280; *Second Nat. Bk. v. Burt*, 93 id. 245; *Gilman v. Reddington*, 24 id. 12, 13; *Foote v. Bryant*, 47 id. 544; *Gilman v. McArdle*, 99 id. 456; *Brown v. Mayor, etc.*, 66 id. 391; *Leavitt v. Wolcott*, 95 id. 222; *Trimmer v. Marsh*, 54 id. 599, 606;

Opinion of the Court, per RUGER, Ch. J.

Howell v. Leavitt, 96 id 617; *Hair v. Clews*, 6 Sup. Ct. Rep. 155; 22 C. L. J. 214; 1 Pomeroy's Eq. Jur. 257, § 251; Id. 251, §§ 242, 276; *Van Schryver v. Mulford*, 59 N. Y. 426; *Welles v. Yates*, 44 id. 531; *Fairchild v. Fairchild*, 64 id. 478.) If no evidence was excluded that would have wiped out the vital defenses of defendants, or if admitted would have established a defense false in principle, the judgment must stand. (Code, § 1003; *Church v. Kid*, 3 Hun, 259; *Marvin v. Marvin*, 11 Abb. [N. S.] 102; *King v. Whaley*, 59 Barb. 71; *Apthrop v. Comstock*; 2 Paige, 482; *In re N. Y. C. & H. R. R. Co.*, 90 N. Y. 346, 347; *Bean v. Tonnele*, 94 id. 385.) Elizabeth S. Marvin is not entitled to a jury trial in this action. (*Harrington v. Bruce*, 84 N. Y. 104; *Coster v. Clark*, 3 Edw. Ch. 428; *Buchan v. Sumner*, 2 Barb. Ch. 200; *Mattock v. Mattock*, 5 Ind. 403; *Cogswell v. Central*, 35 Alb. L. J. 473.)

RUGER, Ch. J. This action was originally brought by Simon L. Greenwood, assignee of Le Grand Marvin, to procure a dissolution of the partnership theretofore existing between Le Grand and George L. Marvin; an adjudication as to what constituted the assets of the firm; the conversion of such assets into money; the payment of the firm obligations, and an accounting between the respective members in regard to all their partnership transactions, and a determination of their several interests in the residue of such property.

The complaint contained express allegations that certain real property, therein specifically described, was partnership property and constituted a part of the firm assets.

The original answer of the defendants, while admitting the existence of the partnership, stated, with respect to the allegations relating to the ownership of the real property, as follows: "And they deny that said Le Grand and George L. Marvin, as copartners, owned or held in the name of said George L. Marvin, as trustee, or otherwise, the real estate mentioned or described in said complaint, or any part thereof, or that they were at any time copartners in any real estate

Opinion of the Court, per RUGER, Ch. J.

purchased with money or means charged to the respective partners; and said defendants deny that in any real estate mentioned or described in said complaint, the legal title to which is in the said George L. Marvin, said Le Grand Marvin had had at any time any interest whatever, except such as he may have obtained under and by virtue of a certain instrument in writing executed by the said Le Grand and George L. Marvin, of which the following is a copy." (Then follows a copy of a partnership agreement between the parties executed in 1852, which is hereinafter recited, so far as it is material to the questions in this case.)

This answer is plainly evasive and leaves the question of the ownership of the real estate, in terms, to depend upon the construction to be given to the agreement of 1852.

Upon the trial of the action before the court without a jury, an interlocutory judgment was rendered determining that certain portions of the real estate described in the complaint, were partnership property, and ordering a reference to take an account of the partnership affairs. This judgment was affirmed upon appeal to the General Term, and from such judgment the defendants appeal to this court.

It is not our intention to enter into a detailed examination of the evidence in the case, inasmuch as that duty has been most fully and satisfactorily performed by Mr. Justice SMITH in his opinion at General Term, and we will, therefore, refer to such additional facts and considerations only as have been suggested upon the argument in this court.

It has already been seen that the main question in the case is whether certain real estate, purchased during the existence of the partnership and title taken in the name of George L. Marvin, was partnership property and belonged to the firm, or was the individual property of George L. Marvin. As found by the trial court, the parties formed a partnership under the firm name of Le Grand & George L. Marvin, to do a land-agency and real estate business at Buffalo, in 1838, which continued without practical change in its mode of doing business until 1864, when it was term-

Opinion of the Court, per RUGER, Ch. J.

inated by mutual consent. A written agreement of partnership was executed at the organization of the firm in 1838, by which the members were to become equal partners in a business already established, and which had for some time been carried on by Le Grand alone, and called "Law and agency business and business appertaining thereto." In 1842 other written agreements were made between the parties by which it was provided, among other things, that the original firm was dissolved, but that its members should still continue the partnership, and complete the business of the old firm, but that George L. should be the legal owner of the property employed and acquired in such business, but should pay to Le Grand for his services his expenses, provided they did not exceed one-half the net profits of the concern, and should account to him for such net profits. In 1852 a third agreement was made between them, by which, among other things, it was provided that the partnership firm should continue at the equal benefit and risk of the respective parties, and declaring that "the real estate and the interest therein of said parties, whether standing in the name of said Le Grand or George, shall be and are for the equal benefit and interest of said parties, share and share alike, subject to all liabilities. * * * The personal property of said parties is now the equal property of said parties, share and share alike," with a single exception not now important to notice.

It further appeared that no settlement of partnership accounts had ever been had between the members of the firm, and although they kept books of account, they were kept in such a manner that it was impossible to determine accurately therefrom how much either of the members of the firm had drawn from, or paid to, or for the firm, or what the respective interest of the parties were in the partnership assets.

It did appear, however, that the purchase-price of the real estate in question, which was mainly acquired in 1842, was paid from partnership funds, and the taxes and expenses thereon were

Opinion of the Court, per RUGER, Ch. J.

generally paid indifferently by either member of the firm ; and its rents, issues and profits had been collected, received and accounted for to the firm as firm property, indifferently by each of the parties. Much other evidence was also given in relation to this subject upon the trial, including the making of express and implied admissions and declarations by George L. Marvin in connection with the possession, occupation and leasing of such real estate, that the same belonged to the firm. Some declarations, written and oral, of Le Grand Marvin, made mostly between the spring of 1842 and the year 1852, to the effect that George L. Marvin was the owner of the property, were testified to on the part of the defendants ; but we ascribe little weight to them, inasmuch as there were obvious reasons, fully disclosed in the negotiations leading to the purchase of the property, on account of which, at the time, it was thought best, by all parties, that the title thereto should be vested in George L. Marvin, and the same reason which dictated that course, would continue to influence any declarations thereafter made by Le Grand in reference to the subject. The only change made in the rights of the parties, by the agreement of 1842, was to place the legal title of their property and acquisitions in George L. Marvin instead of in the firm.

The equitable rights of the parties were to remain the same ; the legal owner was to account to the other party for the net profits of the business, and no other mode of division is suggested than that of equality. If, therefore, that agreement effected any change in the relations of the parties, it operated as a temporary expedient to bridge over the period of Le Grand Marvin's pecuniary embarrassment, presumably with a view of restoring the original relations of the parties at some future time when it would be safe to do so. If that agreement was executed, as seems very probable, with the view of hindering and delaying the creditors of Le Grand, it was still competent for the parties, in the absence of interference by creditors, to rescind it at any time, and to restore to each other an equal legal interest in the property acquired under such agreement.

Opinion of the Court, per RUGER, Ch. J.

We think this was intended to be accomplished by the contract of 1852. That agreement amounted to an unqualified acknowledgment by George L. Marvin, that the parties had theretofore dealt in and acquired real estate and owned such property as partners, although it nominally stood in the name of George L. Marvin, and that such property was intended to be subjected to the obligations of the last partnership agreement. It did not purport to convey any property or create any title, but it acknowledged that the property previously acquired by the parties, both real and personal, belonged in equal proportions to the respective members of the firm.

The appellants refer to the finding of the trial court that Le Grand Marvin did not acquire any interest in the real estate by the contract of 1852, and claim that the plaintiff, not having appealed from such finding, is bound thereby, and cannot now question it. It is undoubtedly true that he did not acquire his interest at that time, inasmuch as the contention of the plaintiff is, that it was acquired at the time the property was bought, and that finding, therefore, is not inconsistent with the position that the contract of 1852 is most persuasive evidence of the secret trust upon which the property was originally obtained by George L. Marvin. If effect be given to all of the language employed by the parties in the agreement, it is not possible to give any substantial operation to this clause of the contract, without holding it to apply to the lands in controversy, standing in the name of George L. Marvin. The writing, like the other partnership agreements, is ambiguous in its language, and requires extrinsic evidence to explain the nature of the business and the identity of the property referred to therein. Parol evidence for this purpose was entirely competent, and has been given with such fullness that nothing is left uncertain with reference to those questions. (*Fairchild v. Fairchild*, 64 N. Y. 471.) The question, therefore, as to whether the lands in dispute constituted partnership property, was one of fact upon all of the evidence in the case, and was determinable by parol evidence independent of the particular form which the

Opinion of the Court, per RUGER, Ch. J.

transaction took, or the name in which the title was taken. (*Chester v. Dickerson*, 54 N. Y. 1; *Fairchild v. Fairchild*, *supra*.)

The negotiations for its purchase were mainly conducted by Le Grand, and when it was consummated by the delivery of the joint and several notes of George L., Asa and Le Grand Marvin in payment of the purchase-price, Le Grand took an active part in the subsequent management and control of the property, and contributed to the payment of the obligations given upon its purchase.

Considering the equivocal character of the answer; the evident intent of the agreement of 1842; the unqualified acknowledgments of the contract of 1852, and the implied as well as express admissions of George L. Marvin subsequent to that time, it is conceding to the appellants in this case all that can fairly be claimed for them, that they have made a question of conflicting evidence as to the ownership of the property in dispute, calling for a finding of fact by the trial court.

The findings that such property was purchased for partnership purposes and paid for with partnership funds, having been affirmed by the General Term, are necessarily conclusive upon us as to the ownership and character of the property.

Real estate purchased by a partnership firm for partnership purposes with partnership funds, is regarded in equity, so far as the firm and its creditors are concerned, as personal property.

Widows are not dowable therein. (*Sage v. Sherman*, 2 N. Y. 417.)

The interests of the respective members of the firm in such property are not required to be established by deed or instrument in writing under the statute of frauds. (*Chester v. Dickerson*, 54 N. Y. 1; *Robbins v. Robbins*, 89 id. 251.) And the creation of trusts as to such interests is not prohibited by the statute of uses and trusts. (*Fairchild v. Fairchild*, 64 N. Y. 471; *Marvin v. Marvin*, Ct. of App., MSS. opinion by ALLEN, J.; *Robbins v. Robbins*, *supra*.)

After the dissolution of a firm, and the claims of its creditors are discharged, and the equities of the respective partners in its assets are determined and satisfied, such property, so far as

it is preserved in specie, and is awarded or conveyed to the respective members, undoubtedly loses its character of personal property and again becomes subject to the rules governing the devolution of real estate. But so long as the partnership affairs remain unsettled, like all other assets of the firm, its real estate is equitably pledged to creditors, and liable to be absorbed and disposed of in the process of liquidating the firm debts, and satisfying the claims of the respective partners as against each other.

As was said by CHURCH, Ch. J., in the *Fairchild Case*: "The English rule gives to the real estate of a partnership the character and qualities of personal property as to all persons, and the remainder, after paying debts and adjusting the equities of the partners, goes to the personal representatives and not to the heir, probably on account of the great injustice which would result by the laws of inheritance in England. * * * But the American rule, that the remainder descends to the heir, does not affect the character of the property as partnership effects, except that the incidents and qualities of real estate are revived. It is divided as so much money capital would be, but it resumes its original qualities. The same evidence, however, which would make it partnership property for the purpose of paying debts and adjusting the equities between the partners, would establish it for the purpose of final division."

In this action we are concerned only with the character which the law ascribes to partnership property while in the hands of the firm as a legal entity, having absolute power of disposition thereof, for the purposes of the partnership business. When it becomes released from the trust imposed upon it as partnership property, it doubtless resumes the usual characteristics of real estate; but it is quite probable that such a result may never happen in this case, as one of the principal objects of the action is to secure its sale for the purpose of paying firm debts, which appear to exist in considerable amounts.

It is claimed by the respondent that the question as to the

Opinion of the Court, per RUGER, Ch. J.

ownership of this real estate has been previously adjudicated in an action between George H. Marvin and Le Grand Marvin, in which George L. Marvin was a privy and bound by the decision of the case. We think there is much reason for this contention; but do not consider it necessary to pass upon it in view of the similar result reached upon the other branch of the case.

A further claim is made by the defendants, that the plaintiff has not such an interest in the subject of the action as entitles her to maintain it. The argument is that the conveyance from Le Grand Marvin to Simon L. Greenwood was void as being a transfer of real estate in trust for the benefit of the grantor, and was not one of the trusts authorized to be created by the statute of uses and trusts.

We have already seen that such property, until discharged from the trust under which it was held as partnership property, cannot be regarded as real estate for any purpose. This action is not brought for the purpose of recovering the possession of real estate or affecting its title. The question of the ownership of the real estate is merely incidental to the main object of the action, and would have arisen in the same manner upon a partnership accounting if the real estate had not been mentioned in the pleadings. (*King v. Barnes*, 109 N. Y. 267.)

It was not improper to refer in the complaint to the character of the partnership assets, but it was wholly unnecessary in order to secure an accounting as to partnership affairs. If, however, we examine the character of the transfer from Le Grand Marvin to Greenwood, it will be seen that it does not purport to create a trust in real property; and if such property does come to the hands of the assignee, it will result from the contingencies attending the judicial settlement of the partnership estate, and not through the force of the transfer to him. The evidence shows that Le Grand Marvin, before the commencement of the action, conveyed by an instrument in writing to Simon L. Greenwood, his heirs and assigns forever, all of the property, both real, personal

Opinion of the Court, per RUGER, Ch. J.

and mixed, owned by him in partnership with George L. Marvin. It also appeared that Greenwood, on the same date, executed and delivered to Le Grand an instrument in writing declaring, in substance, that he held the property and its proceeds, after deducting therefrom payment for his disbursements and services in managing, selling and taking care of the same, in trust, to and for the use of Le Grand.

The legal effect of the assignment referred to was to vest in the assignee the power of calling the other members of the firm to account, and to enforce the rights of Le Grand in any surplus in the assets which might remain, after liquidation of the firm's obligations, and the adjustment of partnership equities. It gave no present interest in specific articles of property, but armed the assignee with power to procure its conversion into money by sale, and the distribution of any residue of the proceeds, in whatever form they might exist, to the respective members, according to their interests therein. The right thus transferred was a mere chose in action, subject, in respect to its mode of transfer, to the rules regulating the disposition of personal property alone. (§ 1910, Code of Civil Pro.) We are not able to see any point of view from which the appellant's contention can be supported. A large portion of the property conveyed was, confessedly, personal property, in respect to which the provision of the statute of uses and trusts confessedly has no application. The trust as to such property, if one was created, was undoubtedly valid, and conferred a right of action upon the assignee to enforce an accounting as to all the partnership assets. But the declaration of trust was confined to the interest passing by the assignment, and, as we have seen, that instrument conveyed no legal interest in the real estate of the firm.

It may further be said that this claim of the appellant is in the nature of a plea in abatement, and assumes the right of Le Grand Marvin to recover his interest in the partnership assets, but insists that the plaintiff has not succeeded to his rights. Such a plea is styled a dilatory one, as it does not affect the merits of the action, and is not favored in law.

Opinion of the Court, per RUGER, Ch. J.

A proper regard for justice and the decent administration of the law requires that a litigation which has already raged for a quarter of a century over a question which the evidence seems to place beyond reasonable doubt, should be decided upon its merits, and not disposed of on a technical point which would remand the controversy to be begun anew, between parties who are all represented in this action, and whose rights can be effectually settled herein.

We are of the opinion that the defendants have no such interest in the question as entitles them to contest the validity of this assignment. Assuming that the real estate is partnership property, as we must, their only interest in that part thereof which did not belong to their testator, was to see that it was awarded to Le Grand Marvin, or some one who legally represented him. As between Le Grand Marvin and his assignee, the conveyance of his interest was undoubtedly valid, and transferred the legal right to demand an accounting to such assignee.

Le Grand Marvin was made a party defendant to this action and would, undoubtedly, be bound by any adjudication made therein.

It was said by CHURCH, Ch. J., in *Sheridan v. Mayor, etc.*, (68 N. Y. 30), that "a plaintiff is the real party in interest under the Code, if he has a valid transfer as against the assignor, and holds the legal title to the demand. The defendant has no legal interest to inquire further. A payment to or recovery by an assignee occupying this position is a protection to the defendant against any claim that can be made by the assignor." (*Seymour v. Fellows*, 77 N. Y. 178; *Sullivan v. Bonesteel*, 79 id. 631.)

The right of the present plaintiff to continue the action as the executrix and legatee of Simon Greenwood was adjudicated by the order substituting her as plaintiff in his place. (*Smith v. Zalinski*, 94 N. Y. 519.)

We have examined the other exceptions in the case with considerable care, but find none of sufficient materiality to

Statement of case.

persuade us that any error justifying a reversal of the judgment was committed by the trial court.

The judgment should, therefore, be affirmed, with costs.

All concur.

Judgment affirmed.

FREDERICK W. MILLER et al., Executors, etc., Respondents, v.
SAMUEL ZEIMER et al., Appellants.

111	441
115	508
111	441
129	388

While the innocent purchaser of a usurious security, when the purchase was induced by fraud, may enforce the security against the maker if he is privy to the fraud, to the extent of the money paid by such purchaser, or may rescind and recover back that sum, with interest, the policy of the usury laws requires a limitation to that amount, and he cannot in any form of action recover more.

Where, therefore, a bond and mortgage was executed without consideration, and M., plaintiffs' testator, purchased the same for less than its face, but in good faith and in reliance upon representations on the part of the mortgagor and mortgagee that the securities were valid, given upon a full consideration and free from usury, and where, in an action to foreclose the mortgage the judgment decreed a sale but only to satisfy the sum actually advanced, *held*, that an action was not maintainable against the mortgagor and mortgagee to recover, because of the fraud, the difference between the value of the mortgage as represented and its actual value to the assignee.

(Argued October 24, 1888; decided November 27, 1888.)

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made November 4, 1885, which affirmed a judgment in favor of plaintiffs entered upon a verdict.

This action was brought by plaintiffs as executors of the will of Christopher Miller, deceased, to recover damages alleged to have been sustained by him by reason of a criminal scheme and conspiracy "entered into by defendants" for the purpose of borrowing and obtaining money on worthless securities.

Statement of case.

The pleadings alleged, in substance, and it appeared that defendant, Samuel Zeimer, executed without consideration and delivered to defendant Stransky his bond and mortgage for the sum of \$15,000, which securities were put into the hands of defendant Raubetscheck to be sold at a discount. Both Zeimer and Stransky signed writings to the effect that said securities were valid, given for a full consideration; that there were no equities or defenses against the same, and that they were free from usury. Relying upon said representations, said plaintiffs' testator purchased and took an assignment of said securities, believing them to be valid, paying therefor \$13,600. The bond and mortgage not having been paid when due, Miller brought an action to foreclose the same, in which the mortgagor set up as a defense that the securities were usurious. It was so adjudged, but it was held that, to the extent of the consideration paid for the transfer, the mortgagor was estopped by his declarations and a sale was directed for that amount, with interest. This amount, with the costs, was paid by Zeimer.

Plaintiffs claimed to recover as damages for the fraud the difference between the amount so paid and the face of the securities, with interest, and also counsel fees incurred in the foreclosure.

A. R. Dyett for appellants. The test of assignability of a cause of action is whether it would survive to personal representatives. (*Bixby v. Wood*, 24 N. Y. 607; *Zabraskie v. Smith*, 13 id. 329.) The bond and mortgage, with all the cause of action in the complaint, which was based upon and grew out of the assignment thereof to the testator, was so inseparably connected therewith that the one could not exist without the other, and when the bond and mortgage were assigned to Mrs. Moss, she became the owner of the principal debt and entitled, as an incident, to the damages claimed in the complaint, if anybody was entitled thereto, and the cause of action in the complaint was extinguished in the plaintiffs. (*Spars v. Mayor, etc.*, 10 Hun, 160, 163, 164; *Langdon v. Buel*,

Statement of case.

9 Wend. 80, 84; *Parmlee v. Dann*, 23 Barb. 461; *Craig v. Partis*, 40 N. Y. 181; *Patterson v. Hull*, 9 Cow. 747; *Bowdoin v. Colma*, 6 Duer, 182; *Gallararty v. Orser*, 4 Bosw. 94; *McMahon v. Allen*, 35 N. Y. 403, 408; *Allen v. Brown*, 44 id. 228; *Gerwig v. Sitterly*, 56 id. 214; *Campbell v. Birch*, 60 id. 214; *Bolen v. Crosby*, 49 id. 183; *Jackson v. Blodgett*, 5 Cow. 202.) The bond and mortgage having been assigned to Mrs. Moss at the request of plaintiff's testator, he would be estopped from setting up usury. (*Barnett v. Zacharias*, 24 Hun, 304; 89 N. Y. 637.) The plaintiff's testator received from Samuel Zeimer the full amount paid for the bond and mortgage, with interest and costs, and that was all he could recover as damages for the fraud alleged in the complaint. (*Webb v. Odell*, 49 N. Y. 583; *Littauer v. Goldman*, 72 id. 510; *Ross v. Terry*, 63 id. 613; *Take v. Smith*, 7 Abb. [N. S.] 106; *Whitney v. Nat. Bk. of Potsdam*, 45 N. Y. 303; *Payne v. Burnham*, 62 id. 72.) When a party is induced by fraud to enter into a contract, he has two remedies, to rescind it and recover the consideration, but no more, or to affirm it and recover damages for the fraud. (*Bowers v. Mandeville*, 95 N. Y. 239, 240; *Webb v. R. W. & O. R. R. Co.*, 49 id. 426; *Ryan v. N. Y. C. R. R. Co.*, 35 id. 215; *Penn. R. R. Co. v. Kerr*, 62 Penn. St. 353, 368.) Fraud, by which a party is induced to enter into an illegal contract, does not constitute a cause of action for damages sustained thereby. (17 Barb. 397, 406; 7 Wend. 276, 280; 11 Wheat. 258; 10 Barb. 369, 370; 15 Wend. 412, 415; *Thalimer v. Brinckerhoff*, 20 Johns. 386, 398; *Nellis v. Clark*, 4 Hill, 429; *Seneca Co. Bk. v. Lamb*, 26 Barb. 601; 2 Pet. 257; *Rea v. Smith*, 19 Wend. 291; *Gray v. Hook*, 4 Comst. 459; *Peck v. Burr*, 10 N. Y. 298; *Haynes v. Webb*, 102 id. 372-376; *Schiffer v. Dietz*, 83 id. 300, 308.) The court correctly charged that plaintiffs could not recover unless they proved the conspiracy and fraud set forth in the complaint, and upon which the action was based. (*Barnes v. Quigley*, 59 N. Y. 267; *Ross v. Mather*, 51 id. 110; *Beach v. Eager*, 3 Hun, 610; *Bernard v. Seligman*, 54

Opinion of the Court, per ANDREWS, J.

N. Y. 661; *Miner v. Beekman*, 50 id. 337, 341; *Walter v. Bennett*, 16 id. 253, 254; *Degraw v. Elmore*, 50 id. 4, 5; *McMichael v. Kilmer*, 76 id. 40.)

Emile Beneville for respondents. The defendants' contention at the trial that, because the cause of action was founded in tort, it accrued to the plaintiffs' testator, but did not survive and pass to the plaintiffs, is erroneous. (3 R. S. [6th ed.] 732; *Haight v. Hayt*, 19 N. Y. 464; *Johnston v. Bennett*, 5 Abb. [N. S.] 331.) The cause of action for the fraud did not pass to Mrs. Moss with the assignment of the bond and mortgage. (*Hubbell v. Meigs*, 50 N. Y. 480.) The jury having, by their verdict, found, upon conflicting evidence, the fraudulent combination and false representations of the defendants, the plaintiffs' testator's reliance thereon and his consequent purchase of the bond and mortgage, their finding is final and will be upheld. (*Hayes v. Thompson*, 2 Hun, 518; *Chaffee v. Morse*, Id. 602; *Knapp v. Roche*, 62 N. Y. 614.) In actions for fraud and deceit, substantial damages are recoverable. (*Hart v. Ten Eyck*, 2 Johns. Ch. 62; 1 Caine's Eq. 97; 3 Burr. 13, 63; 2 Black. 902; *Hubbell v. Meigs*, 50 N. Y. 480; *Stiles v. White*, 11 Metc. 380; *Libby v. Hurlbut*, 15 Gray, 509.)

ANDREWS, J. The transaction, although in form a mortgage, was, nevertheless, in contemplation of law a loan of money to the extent of the consideration advanced, the mortgage not having had any inception until its transfer to the plaintiff's testator. The mortgage was void for usury by force of the statute, notwithstanding the purchaser was innocent and had no intent to enter into a usurious transaction, but purchased the mortgage, supposing that it was a *bona fide* and valid security. (*Bennet v. Smith*, 15 Johns. 354; *Brooks v. Avery*, 4 N. Y. 226; *Hall v. Earnest*, 36 Barb, 585, and cases cited.) But the plaintiff's testator having been induced to purchase the mortgage upon the false and fraudulent representations of both the mortgagor and mortgagee, that it was a valid security given upon a full consideration, free from usury, they

Opinion of the Court, per ANDREWS, J.

were estopped from setting up this defense. This has now become the settled rule, although the doctrine was established with some hesitation, and there is some ground for supposing that it trenches upon the policy of the usury laws by inducing purchasers to forbear inquiry, relying upon certificates, which have become a common assurance attending the transfer of securities. But the courts have limited the effect of the estoppel in such cases to the purpose of indemnifying the purchaser for the money actually advanced, with interest, and they refuse to permit him to enforce the security to recover the usurious profits or premium in the transaction. (*Payne v. Burnham*, 62 N. Y. 69.) The law was so applied in the former action for the foreclosure of the mortgage brought by the plaintiff's testator. The judgment decreed that the land should be sold to satisfy the sum advanced on the purchase of the mortgage, excluding any allowance for the usurious excess, thereby depriving the transferee of the benefit of his bargain to that extent. The present action was subsequently brought for the deceit, and the plaintiffs seek to recover as damages the difference between the value of the mortgage, as represented, and its actual value to the plaintiff's testator. In short, by changing the form of action, the plaintiffs seek to recover the sum which their testator was precluded from recovering in the action on the contract. The general rule undoubtedly is that gains prevented, as well as actual loss incurred, may be recovered as well in an action for false representations as for breach of contract, so far as they are the natural and proximate result of the wrong. (*Grissler v. Powers*, 81 N. Y. 61.) The case of *Payne v. Burnham* (*supra*) proceeded upon special grounds, not applicable in ordinary cases of contract, and the recovery was limited because the policy of the usury statute seemed to require such a limitation. We think the same policy requires the same limitation here. If the plaintiffs are permitted to recover, they secure the benefit of the usury, which in an action on the contract was denied. There are no authorities in point on the briefs

Statement of case.

of counsel, and none, perhaps, can be found directly applicable. The vice-chancellor, in *Holmes v. Williams* (10 Pai. 332), refers to a somewhat similar question, but expresses no definite opinion. We think the reasoning in *Payne v. Burnham* (*supra*), is against a recovery here. The innocent purchaser of a usurious security, where the purchase is induced by fraud, may enforce the security against an obligor privy to the transaction, to the extent of the money advanced, or he may, on discovery of the fraud, rescind and recover back the money paid, but he cannot, we think, in any form of action, recover more.

This leads to a reversal of the judgment and a new trial.

All concur.

Judgment reversed.

111	446
130	312
111	446
j166	31
e166	493
111	446
168	85
111	446
170	109

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF
NEW YORK, Appellant, v. THE TENTH NATIONAL BANK,
Respondent.

The "New York Court-House," the construction of which was inaugurated by an appropriation in 1860 (Chap. 509, Laws of 1860), was a county building, and the commissioners appointed in pursuance of the act of 1870 (§ 11, chap 382, Laws of 1870) to complete the construction were county commissioners.

The provision of the act of 1872 (Chap. 9, Laws of 1872), authorizing and directing the comptroller of the city of New York to pay back to the various banks, etc., of the city all moneys which had been advanced by them "for the use of any of the departments or commissioners of the city or county" was a valid exercise of legislative power and made such advances binding obligations on the city.

After commissioners were appointed under said act of 1870 they appointed a treasurer, who applied to defendant to make advances to and for the use of the commissioners. This, after its president had consulted with the city comptroller and mayor and had been advised by them that it was proper and right, it agreed to, and did make advances upon checks drawn by said treasurer. No other advances were made to any county commissioners and no other claim for advances to the county was presented under the act. *Held*, that, although the commissioners were not authorized to take the advances on the credit of the county, and the

Statement of case.

defendant was chargeable with notice thereof, they were ratified by the act of 1872 and the city was thereby made liable therefor

All of the checks were drawn ostensibly to pay bills and expenses incurred by the commissioners in the construction of the court-house. It appeared that a fraudulent conspiracy had been entered into by and between the treasurer, another of the commissioners, the comptroller and others, by which certain of the bills were to be raised above their true amount and the excess was to be divided between the conspirators. A portion of the advances made by defendant were upon checks in payment of bills so raised. This conspiracy was unknown to the other commissioners, and defendant's president, who was the sole agent and representative of the bank, in making the advances had no knowledge or notice of the conspiracy or the misappropriation. It was customary for the city banks to make advances to the various departments and commissioners in anticipation of appropriations. *Held*, the fact that part of the advances were so misappropriated did not deprive defendant of the right to recover the same.

It appeared that three of the conspirators were directors of the defendant. Neither of them were present at any meeting of the board of directors when action was taken in reference to the advances, and in no way acted for the bank in the transactions. *Held*, that defendant was not chargeable with notice of the fraud or precluded from claiming the benefit of good faith on its part; that, under the circumstances, knowledge which the directors who were engaged in the conspiracy had could not be attributed to it.

As municipal corporations are creatures of the state and exist and act in subordination of its sovereign power, the legislature may determine what moneys they may raise and expend and what taxation for municipal purposes may be imposed; and so, it may compel such a corporation to pay a claim which has some meritorious basis to rest on.

(Argued October 24, 1888; decided November 27, 1888.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 8, 1888, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial without a jury.

The complaint alleges that the defendant was duly designated as one of the depositories of the moneys of the city and county of New York, and that between the 1st day of December, 1871, and the 31st day of May, 1873, large sums of such moneys were deposited with it upon which it agreed to allow interest at the rate of four per cent upon daily balances; and that there

Statement of case.

of counsel, and none, perhaps, can be found directly applicable. The vice-chancellor, in *Holmes v. Williams* (10 Pai. 332), refers to a somewhat similar question, but expresses no definite opinion. We think the reasoning in *Payne v. Burnham* (*supra*), is against a recovery here. The innocent purchaser of a usurious security, where the purchase is induced by fraud, may enforce the security against an obligor privy to the transaction, to the extent of the money advanced, or he may, on discovery of the fraud, rescind and recover back the money paid, but he cannot, we think, in any form of action, recover more.

This leads to a reversal of the judgment and a new trial.

All concur.

Judgment reversed.

111	446
189	318

111	446
j166	81
e166	493

111	446
168	85

111	446
170	*109

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF
NEW YORK, Appellant, v. THE TENTH NATIONAL BANK,
Respondent.

The "New York Court-House," the construction of which was inaugurated by an appropriation in 1860 (Chap. 509, Laws of 1860), was a county building, and the commissioners appointed in pursuance of the act of 1870 (§ 11, chap 882, Laws of 1870) to complete the construction were county commissioners.

The provision of the act of 1872 (Chap. 9, Laws of 1872), authorizing and directing the comptroller of the city of New York to pay back to the various banks, etc., of the city all moneys which had been advanced by them "for the use of any of the departments or commissioners of the city or county" was a valid exercise of legislative power and made such advances binding obligations on the city.

After commissioners were appointed under said act of 1870 they appointed a treasurer, who applied to defendant to make advances to and for the use of the commissioners. This, after its president had consulted with the city comptroller and mayor and had been advised by them that it was proper and right, it agreed to, and did make advances upon checks drawn by said treasurer. No other advances were made to any county commissioners and no other claim for advances to the county was presented under the act. *Held*, that, although the commissioners were not authorized to take the advances on the credit of the county, and the

Statement of case.

defendant was chargeable with notice thereof, they were ratified by the act of 1872 and the city was thereby made liable therefor

All of the checks were drawn ostensibly to pay bills and expenses incurred by the commissioners in the construction of the court-house. It appeared that a fraudulent conspiracy had been entered into by and between the treasurer, another of the commissioners, the comptroller and others, by which certain of the bills were to be raised above their true amount and the excess was to be divided between the conspirators. A portion of the advances made by defendant were upon checks in payment of bills so raised. This conspiracy was unknown to the other commissioners, and defendant's president, who was the sole agent and representative of the bank, in making the advances had no knowledge or notice of the conspiracy or the misappropriation. It was customary for the city banks to make advances to the various departments and commissioners in anticipation of appropriations. *Held*, the fact that part of the advances were so misappropriated did not deprive defendant of the right to recover the same.

It appeared that three of the conspirators were directors of the defendant. Neither of them were present at any meeting of the board of directors when action was taken in reference to the advances, and in no way acted for the bank in the transactions. *Held*, that defendant was not chargeable with notice of the fraud or precluded from claiming the benefit of good faith on its part; that, under the circumstances, knowledge which the directors who were engaged in the conspiracy had could not be attributed to it.

As municipal corporations are creatures of the state and exist and act in subordination of its sovereign power, the legislature may determine what moneys they may raise and expend and what taxation for municipal purposes may be imposed; and so, it may compel such a corporation to pay a claim which has some meritorious basis to rest on.

(Argued October 24, 1888; decided November 27, 1888.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 8, 1888, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial without a jury.

The complaint alleges that the defendant was duly designated as one of the depositories of the moneys of the city and county of New York, and that between the 1st day of December, 1871, and the 31st day of May, 1873, large sums of such moneys were deposited with it upon which it agreed to allow interest at the rate of four per cent upon daily balances; and that there

Statement of case.

was due it on account of such interest the sum of \$250,000, for which judgment is demanded.

The defendant, in its answer, besides making various material denials, sets up as a counter-claim that, between the 29th day of April, 1871, and the 2d day of September, 1872, it had advanced to the commissioners of the new county court-house of New York, for the use of such commissioners, the large sums of money specified; that, by chapters 9 and 29 of the Laws of 1872, the comptroller of the city of New York, who was then the fiscal officer of the county of New York, was authorized and required to pay back to the defendant the moneys so advanced; that such commissioners were commissioners of the county of New York, and by chapter 304 of the Laws of 1874 the debt to it for the moneys so advanced was made a charge against and a liability of the city; that there is due to it for the moneys so advanced the sum of \$242,579.97, with interest from February 1, 1872, for which judgment is demanded against the plaintiff. The plaintiff replied to the counter-claim alleging various defenses thereto.

The issues thus joined were brought to trial at a circuit before a judge presiding without a jury. The judge found that the defendant was indebted to the plaintiff on account of the interest in the sum of \$66,301.36, and that there was due to the defendant upon its counter-claim, after deducting the debt for the interest, the sum of \$358,849.23, for which sum he ordered judgment in favor of the defendant.

Other facts, so far as material, appear in the opinion.

John H. Strahan and *Simon Sterne* for appellant. The defendant was not only chargeable with knowledge of the limitation of the authority of the court-house commissioners, but made its loans in disregard of this notice, and did so in direct violation of the law under which the claim for advances was sought to be made. (*Hodges v. City of Buffalo*, 2 Denio, 110, 112; *Appleby v. Mayor, etc.*, 15 How. 428; *Donovan v. Mayor, etc.*, 33 N. Y. 291; *Dannat v. Mayor, etc.*, 66 id. 587; *People ex rel. Bennett v. Jackson*, 85 id. 541; *Miller*

Statement of case.

v. *Mayor, etc.*, 76 id. 151.) The claims of the Tenth National Bank for overdrafts of Ingersoll, the court-house commissioner, were not legalized or ratified by chapters 9 and 29 of the Laws of 1872. (Vattel's Rule, Potter's Dwarries on Statutes, 128, 129; Endlich on Interpretation of Statutes, §§ 76-80; *Miller v. Mayor, etc.*, 76 N. Y. 151; Laws of 1860, chap. 10; Laws of 1870, chap. 137; *Maximillian v. Mayor, etc.*, 62 N. Y. 160; *Dash v. Van Kleeck*, 7 Johns. 477; *Wood v. Oakley*, 11 Paige, 400; Sedgwick on Construction of Statutes [2d ed.] 167; *Neff's Appeal*, 21 Pa. 243; *Cox v. Mayor, etc.*, 103 N. Y. 524.) It is clearly incompetent for the legislature to do that by subsequent ratification which it could not originally have authorized. (*Loan Assn. v. City of Topeka*, 20 Wall. 655; *Cox v. Mayor, etc.*, 103 N. Y. 524, 526; *Ehrgott v. Mayor, etc.*, 96 id. 264; *Maximillian v. Mayor, etc.*, 2 Hun, 263; 62 N. Y. 160; *Nelson v. Mayor, etc.*, 63 id. 536; *Dannat v. Mayor, etc.*, 66 id. 585; *Miller v. Mayor, etc.*, 76 id. 151; 5 Johns. 175; 3 Hill, 139; 3 N. Y. 9; *Wardell v. R. R. Co.*, 103 U. S. 651; *Thomas v. R. R. Co.*, 109 id. 523; *Munson v. S. G. & C. R. R. Co.*, 103 N. Y. 73.) It is not constitutionally competent for the legislature to create against the municipality a claim as well as a remedy. (Cooley on Const. Lim. [5th ed.] 455, 469, 470; *Guilford v. Suprs. of Chenango*, 13 N. Y. 143; *Brewster v. Syracuse*, 19 id. 116; *Thomas v. Leland*, 24 Wend. 65; *Hasbrook v. Milwaukee*, 13 Wis. 37; *Silliman v. Marshall*, 60 Ill. 218; *Peop'e v. Harbes*, 37 Barb. 440; *People v. Otis*, 24 Hun, 519; *People v. Batchellor*, 53 N. Y. 128; *People v. Loew*, 102 id. 475.) Leaving Ingersoll out of the question, Connolly's knowledge was the bank's knowledge, even without reference to the meeting of the bank directors in the board room, as he was active in the very transaction which is here under consideration. (*Holden v. N. Y. & E. Bk.*, 72 N. Y. 286; *Craig v. Hadley*, 99 id. 131; 86 id. 163; 96 id. 559; 26 Hun, 630; 31 id. 109; 32 id. 111, 371;

Statement of case.

Bank of U. S. v. Davis, 2 Hill, 451; *Fulton Bank of New York v. Coal Co.*, 4 Paige, 127; *Citizens' Savings Bank v. Blakesley*, 42 Ohio St. 645.) When a portion of a consideration is valid and the other *malum in se*, the failure is entire. The maxim *ex turpi contractu non oritur actio* applies. (*Steinfeld v. Levy*, 16 Abb. Pr. [N. S.] 27; *Gray v. Hook*, 4 N. Y. 449; *Pepper v. Haight*, 20 Barb. 437, 438; *Woodworth v. Bennett*, 43 N. Y. 273.) Knowledge of the fraudulent intent to divert the moneys to be drawn on the part of a single director of the Tenth National Bank, who acted in any way in relation to these advances, is the knowledge of the bank, and is not simply constructive, but actual notice. (Wade on Law of Notice, §§ 681-683; *Bank of U. S. v. Davis*, 2 Hill, 451; *Nat. Security Bk. v. Cushman*, 121 Mass. 490; *Clerks' Savings Bank v. Thomas*, Mo. App. 267-282; *Dana v. Bank of United States*, 5 W. & S. 247; 2 Pomeroy's Eq. Jur. § 667; *First National Bank v. Drake*, 29 Kans. 31; *Bank of New Milford v. Town of New Milford*, 36 Conn. 93.) The legal presumption is that the members of the board of directors of the bank regularly attended the meetings which it was their duty to attend. (*Shilkuecht v. Eastburn's Heirs*, 2 Gill. & J. [Md.] 114; *In re Mason*, 4 Edw. Ch. 418; *Martin v. Webb*, 110 U. S. 7; *Knickerbocker L. Ins. Co. v. Pendleton*, 115 id. 339; *Bank of America v. McNeil*, 10 Bush [Ky.] 54; *Nat. Security Bank v. Cushman*, 121 Mass. 490.) When a paper comes into the possession of a party, who does not produce it, or account for its loss, the most favorable intendment, as to its contents, will be made for the benefit of the other party. (*Livingstone v. Newkirk*, 3 Johns. Ch. 312; *Hudson v. Arundel*, 110b. 109; *S. C.*, 2 P. Wms. 748; *Dalston v. Coatsworth*, 1 id. 731; 1 Ves. 235; *Life & Fire Ins. Co. v. Mec. Fire Ins. Co.*, 7 Wend. 31, *Barber v. Lyon*, 22 Barb. 622, 625.) If the legislature intended, by chapters 9 and 29 of the Laws of 1872, or either of them, to legalize this counter-claim of the Tenth National Bank against the city, tainted as it was in great part by fraud, and wholly illegal, and which is the basis of the judgment recovered herein,

Statement of case.

such legislation is without constitutional authority, and in violation of the Constitution of the United States and of the state of New York. (*Loan Association v. City of Topeka*, 20 Wall. 655.)

Thomas Allison for respondent. Upon the facts as found by the court below the defendant was entitled to recover on its counter-claim. (*People ex rel. Tenth Nat. Bk. v. Green*, 5 N. Y. Sup. Ct. [T. & C.] 376, 378.) As the fact of the advances, having been made by the bank to or for the use of the commissioners, was denied, a peremptory *mandamus* could not be granted until that issue was regularly tried and determined, and this could not be done by affidavits. (*People ex rel. Tenth Nat. Bk. v. Green*, 5 N. Y. Sup. Ct. [T. & C.] 376, 378; *Same v. Bd. of Apportionment*, id. 382.) In view of the act of 1874, consolidating the city and county, the remedy by *mandamus* for county claims no longer existed, the bank's remedy, if it had a valid claim, was by an action against the city for the advances. (*People ex rel. Tenth Nat. Bk. v. Bd. of Apportionment*, 64 N. Y. 627, 628.) To such an action the non-issuance of the bonds would be no defense. (*Quinn v. Mayor, etc.*, 63 Barb. 595, 600; 53 N. Y. 627.) The test of whether officers or commissioners, or other official bodies, are state, city or county officers or bodies does not depend upon the method of their appointment, nor on the fact that their duties are prescribed by statute, but depends upon the character and result of the duties to be performed by them, and upon the question at whose expense are those duties to be performed. (*Wood v. Mayor, etc.*, 7 Hun, 164; *People ex rel. Ryan v. Civil Service Boards*, 41 id. 287, 298; *Walsh v. Mayor, etc.*, Id. 299; 1 N. Y. 401; *Ergholt v. Mayor, etc.*, 96 id. 264; *People v. Stout*, 23 Barb. 349, 350, 352.) The new court house commissioners were commissioners of the county, because they were appointed to discharge a duty primarily resting upon the county, and by which the county was benefited, and the expense of which was to be defrayed by the county. (Code of Pro. §§ 15, 28,

Opinion of the Court, per EARL, J.

51; Laws of 1853, chap. 529; Laws of 1860, chap. 509; Laws of 1861, chaps. 161, 240; Laws of 1862, chap. 167; Laws of 1863, chap. 108, § 1; Laws of 1864, chap. 242; Laws of 1865, chap. 605; Laws of 1866, chap. 837; Laws of 1867, chap. 806; Laws of 1868, chap. 854; Laws of 1869, chap. 875, § 4; Laws of 1870, chap. 382, § 11; Laws of 1871, chap. 583, § 4.) The money having been borrowed by the commissioners without authority, and advanced by the bank for their purposes and use, the legislature had power to supply the want of authority and ratify the unauthorized act, and give it the same force and effect as if such authority had been given originally. (*People v. Mayor, etc.*, 4 Comst. 419; *Brewster v. City of Syracuse*, 19 N. Y. 116; *Town of Guilford v. Supervisors*, 13 id. 143; *People v. Mitchell*, 35 id. 551; *Darlington v. Mayor, etc.*, 31 id. 164; *Brown v. Mayor, etc.*, 63 id. 239, 244; *Nelson v. Mayor, etc.*, Id. 535; *Dillon's Munic. Corp.* [3d ed.] §§ 79, 80, 814; *Cooley on Const. Lim.* [13th ed.] 461, 467, 468, 473; *Syracuse Bk. v. Davis*, 16 Barb. 188.) The fact that the advances made were in violation of the national banking act has nothing to do with the question of legislative ratification. That fact did not in any way impair the right of defendant to recover the money advanced. (*Gold Mining Co. v. Nat. Bk.*, 96 U. S. 640; *Duncomb v. N. Y., H. & N. R. R. Co.*, 84 N. Y. 190, 205.) The defendant bank is not chargeable with any notice or knowledge had by any of its officers or directors, who did not in fact act in its behalf or as its agents in the making of the advances. (*Bank of U. S. v. Davis*, 2 Hill, 451; *President, etc. v. Cornen*, 37 N. Y. 320; *Holden v. N. Y. & E. Bk.*, 72 id. 291; *At. Bk. v. Savery*, 82 id. 293; *Cragie v. Hadley*, 99 id. 131.)

EARL, J The learned and exhaustive argument by the counsel for the city has failed to convince us that the judgment appealed from is erroneous.

The construction of the New York court-house seems to have been inaugurated by an appropriation, in the act

Opinion of the Court, per EARL, J.

chapter 509 of the Laws of 1860, of \$100,000 "for the purpose of erecting suitable court rooms for the accommodation of the several courts of the county." By the act chapter 161 of the Laws of 1861, the board of supervisors of the county of New York was authorized and empowered to acquire and take for the purposes of building a court-house therein, such land in the city and county of New York as they might deem necessary for the purpose; and provision was made for taking and acquiring the land by condemnation proceedings, and for raising money on the credit of the county to pay for the same. By chapter 24 of the same year and chapter 167 of 1862, 108 of 1863, 242 of 1864, 605 of 1865, 837 of 1866, 806 of 1867, 854 of 1868, and 875 of 1869, the board of supervisors was authorized to raise money for the construction and completion of the court-house. Under the act of 1861, land was acquired from the city upon which to erect the court-house, and during all the years named the construction thereof was carried on by the board of supervisors through agencies employed by it. The bills for work and materials employed in the construction were audited by the board of supervisors like other county bills, and were paid by the comptroller of the city. Then the system for the construction of the court-house was changed by section 11 of the act, chapter 382, of the Laws of 1870, which authorized and empowered the mayor of the city to appoint four commissioners for the final completion of the "new county court-house," and provided that upon the appointment of the commissioners all power of the board of supervisors over the erection of the court-house should cease; that the commissioners should have the power to expend and should complete the court-house for a sum not exceeding \$600,000, which amount the comptroller was authorized and directed to raise on the stock of the county, to be designated the "New York County Court-House stock No. 4;" that the money so raised should be paid by the comptroller on vouchers approved by the commissioners. Under that act, on the 1st day of December, 1870, the mayor appointed James H. Ingersoll,

Opinion of the Court, per EARL, J.

Michael Norton, Thomas Coman and John J. Welsh the commissioners, who continued in office and served as such until some time after 1872.

By section 7 of the act chapter 583 of the Laws of 1871, the sum of \$750,000 was appropriated for the completion of the "New York County Court-House," to be expended under the direction and supervision of the court-house commissioners; and the comptroller was commanded on the requisition of the commissioners to pay over to their credit such sum or sums as they might from time to time deem necessary for such purpose; and the comptroller was authorized and directed to raise the amount appropriated on the stock of the county of New York. In the same act it was provided that no bonds or stocks of the city or county of New York, except those authorized to be issued by the direction of the commissioners of the sinking fund, and revenue bonds issued in anticipation of the taxes of the current year, should be thereafter issued except by the concurrence and authority of all the persons composing the board of apportionment, consisting of the mayor, comptroller, the commissioner of public works and the president of the department of parks, who should be present at a meeting called by the chairman of the board for that purpose on three days notice.

From this review of the statutes it is clear that the court-house was a county building, built for county purposes, at the county expense, upon county real estate actually purchased of the city, and that when built it belonged to the county. The commissioners appointed to build it were county commissioners, engaged in disbursing county moneys, and discharging functions devolved upon them as county officials or agents. It matters not that they were appointed by the mayor of the city. It was for the legislature to determine how they should be appointed. It could have named them in some act, or could have devolved their appointment upon the board of supervisors, or the sheriff, or some other local officer. Their character as county commissioners depended, not upon the source of their appointment, but upon the nature of their duties

Opinion of the Court, per EARL, J.

and powers, and of the work they were required to perform. That they were county commissioners has been several times decided by the courts in New York, in unreported decisions, and the following cases tend strongly to the same conclusion: *People v. Stout* (23 Barb. 349); *Wood v. Mayor, etc.* (7 Hun, 164); *People ex rel. Ryan v. The Civil Service Board* (41 Hun, 287); *Ehrgott v. Mayor, etc.* (96 N. Y. 264); *Walsh v. Mayor, etc.* (107 N. Y. 220).

It is conceded, and was so found by the trial judge, that the commissioners had no power or authority to borrow any money on behalf or on the credit of the county, and that they did not, and could not, bind the county for the advances made to them by the defendant; and if there had been no further legislation than that already referred to, the city, succeeding to the liabilities of the county, would have been under no legal liability to the defendant for the claim made by it.

It is important, before going further, to inquire whether the defendant made these advances in good faith, and, to answer this inquiry, a few facts must first be stated. After the commissioners were appointed, Ingersoll was chosen their treasurer, and he was such from the date of his appointment until some time subsequent to December 31, 1872. The bank received formal written notice of his appointment as treasurer, and that his would be the only signature in dealings of the commissioners with the bank. In the month of April, 1871, Ingersoll, as treasurer, applied to the defendant to make advances to and for the use of the commissioners, and to act as a bank of deposit for them, and it agreed to do so. Before, however, it made such agreement, its president called upon both the comptroller and the mayor of the city and they each informed him that it was proper, safe and right for him to take the account of the commissioners and make the advances. Thereafter, before the 2d day of September, 1871, the defendant advanced and paid to and for the use of the commissioners, upon checks drawn upon it by Ingersoll, as treasurer, and indorsed by the payees therein named, the sum of \$442,579.97.

Opinion of the Court, per EARL, J.

The only money deposited to the credit of the commissioners was the sum of \$200,000, deposited by the comptroller on the 7th day of July, 1871, in compliance with a requisition made by the commissioners upon him, and out of an appropriation authorized by the board of apportionment. All the checks were drawn to pay bills and expenses ostensibly made by the commissioners in the construction of the court-house, and all the money drawn upon the checks was actually applied to pay such bills and expenses, except the sum of \$45,000, and that was fraudulently misappropriated under the following circumstances: A fraudulent conspiracy had been entered into by Ingersoll, William M. Tweed, Richard B. Connolly, then the comptroller, and others, by which certain of the bills were to be raised forty per cent above their true amount, and this excess was to be divided between the conspirators for their own private use. This conspiracy was unknown to the other commissioners, and there is no proof that it was known to the mayor of the city. All the dealings of the bank with Ingersoll as treasurer were conducted through its president, William M. Bliss, and he was the sole agent and representative of the bank. There was nothing in the form of the checks drawn by Ingersoll to give him any notice of the conspiracy or fraud, and he had no knowledge whatever of the misappropriation of any of the money drawn. There was no proof whatever that he acted in bad faith in making the advances upon the checks. He ought to have known that the commissioners had no authority to take these advances upon the credit of the county. But the knowledge which the law imputes to him of their want of authority has no bearing whatever upon the question of his good faith. He used due diligence. He consulted the comptroller and the mayor, who was also a lawyer, and was assured that the arrangement which the commissioners proposed to make with him was right and proper; and it was not an unusual arrangement, as the city banks were much in the custom of advancing moneys to the various departments and commissions of the city in anticipation of appropriations to be made.

Opinion of the Court, per EARL, J.

But it is claimed that knowledge of the conspiracy and fraud must be imputed to the bank, because three of the conspirators, Ingersoll, Tweed and Connolly were directors of the bank, and hence that the bank could not claim the benefit of good faith. But none of these directors represented the bank in these transactions and in no way acted for the bank in them. Connolly was consulted as comptroller, and Ingersoll acted for the commissioners. Neither of them was present at any meeting of the directors when any action was taken in reference to the advances. The sole agent and representative of the bank was Bliss, its president, and he was entirely innocent of any wrong. The knowledge these conspirators had while engaged in their fraud for their own benefit could not, therefore, be attributed to the bank; and to this effect are all the decisions. (*Bank of U. S. v. Davis*, 2 Hill, 451; *President, etc., v. Cornen*, 37 N. Y. 320; *Holden v. N. Y. & Erie Bk.*, 72 id. 291; *Atlantic Bank v. Savery*, 82 id. 291; *Cragie v. Hadley*, 99 id. 131; *Custer v. Tompkins Co. Bk.*, 9 Penn. St. 27; *President, etc., Washington Bank v. Lewis*, 22 Pick. 24; *Farmers and Citizens' Bank v. Payne*, 25 Conn. 444.)

The question now remains whether these advances, made by the defendant, were subsequently ratified by competent legislative action. Before September 1871, the appropriations made for the various city departments and commissions had been exhausted, and in that month and October and November of the same year certain banks, trust companies and insurance companies advanced to the comptroller of the city or the departments and commissions large sums of money, for the purpose of paying the expenditures of such departments and commissions during those months and the month of December, and they took as security for the moneys so advanced assignments of the claims to pay which the moneys were borrowed. These moneys were advanced without authority of law to meet an emergency, with the expectation that subsequent legislative action would ratify the advances. On the 30th day of January, 1872, in section 2 of the act chapter 9 of the laws

Opinion of the Court, per EARL, J.

of that year, it was provided that the comptroller, out of the proceeds of bonds authorized to be issued by that act, should be authorized and required to pay back to the "various banks, insurance and trust companies of the city of New York all moneys which have been advanced by said banks, insurance and trust companies, or any of them prior to the 31st day of December, 1871, to or for the use of any of the departments or commissions of the city or county of New York." These advances made by the defendant are plainly embraced within the language of this act. They were advances made by a city bank to and for the use of county commissioners. The claim for the advances was before the passage of the act as well known to the comptroller as the claims of the other corporations which had advanced moneys. We may assume that the act was drawn under the supervision, or at the instigation of the comptroller, the financial officer of the city and county; and if it had not been intended to provide for these advances, the language would have been such as to exclude them. It appears, too, that the court-house commissioners were the only county commissioners, strictly speaking, to which the act could apply, and there was no other claim for advances made to the county presented under the act. It is true that these advances were illegal, and so were all the other advances referred to.

These advances were made in good faith, and all the moneys advanced were used for the county except the sum of \$45,000, fraudulently diverted by the conspirators. The fact that the conspirators were among the directors of the bank did not deprive its innocent directors, stockholders and creditors of all claim to just consideration, and did not make it an outlaw without rights, a *caput lupinum* entitled to no protection.

While the legislature may not always be held to have had full knowledge of all the facts and consequences involved in its action, its ignorance cannot be presumed for the purpose of nullifying the plain meaning of its language. But we have no right to assume that if the legislature had known the precise facts as they now appear in this record, it would have

refused to ratify a claim for moneys thus advanced in accordance with a common practice, in good faith, a small portion of which only was misappropriated by the trusted agents of the county. As the plain language embraces these advances, they should not by construction be taken out of the statute, except we can clearly perceive a legislative intention that they should not be embraced ; and that, upon a consideration of all the facts, we are unable to perceive.

It is further claimed that the legislature was not competent to ratify these advances and make them a binding obligation on the county. It is said that it could not originally have authorized advances to be made to the conspirators for fraudulent division among themselves, and that hence it could not ratify such advances. This may be conceded ; but here these advances were made in good faith, not to be divided among the conspirators, but to and for the use of the county. This the legislature could have authorized, and the county would have been bound, although the conspirators had misappropriated all the money ; and what it could originally have authorized it could ratify and confirm. Municipal corporations are creatures of the state and exist and act in subordination to its sovereign power. The legislature may determine what moneys they may raise and expend, and what taxation for municipal purposes may be imposed ; and it certainly does not exceed its constitutional authority when it compels a municipal corporation to pay a debt which has some meritorious basis to rest on. The provisions of this act are sanctioned by the principles of the following decisions : *Town of Guilford v. Supervisors* (13 N. Y. 143) ; *Brewster v. City of Syracuse* (19 id. 116) ; *Darlington v. Mayor, etc.* (31 id. 164) ; *Brown v. Mayor, etc.* (63 id. 239).

We, therefore, conclude that judgment allowing defendant's counter-claim was right and should be affirmed.

All concur.

Judgment affirmed.

Statement of case.

111 460
149 201

AUSTIN E. PRENTICE, as County Treasurer, etc., Respondent, v.
ABIJAH WESTON et al., Appellants.

The provisions of the "Lewis County Tax Law" (Chap. 153, Laws of 1884, amended by chap. 215, Laws of 1885), declaring that when taxes are assessed on lands and have been returned to the state comptroller or the county treasurer unpaid, it shall cease to be lawful for the owners to peel bark or cut timber on the land or to permit others to do so, and imposing a penalty for a violation of this command, are not obnoxious to the constitutional provisions protecting property rights.

Upon the return of the taxes as unpaid the sale of the land is the sole remaining resource for the collection of the taxes, and it is competent for the legislature to restrain acts which would strip the land of its chief value and tend to make unavailing the final remedy.

The legislature may prohibit a use of private property which violates the duty the owner owes to his neighbor or to the state.

(Argued October 10, 1888; decided November 27, 1888.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made January 10, 1888, which affirmed an order of Special Term overruling a demurrer interposed by defendants and from an interlocutory judgment against the defendants entered thereon. (Reported below, 47 Hun, 121.)

This action was brought by plaintiff, as county treasurer of Lewis county, to recover penalties under section 17 of chapter 153 of the Laws of 1884, as amended by chapter 215 of the Laws of 1885.

The complaint alleged, in substance, that defendants were the owners of certain lands in the county of Lewis, upon which taxes had been assessed and returned to the county treasurer as unpaid; that thereafter, and while said taxes remained unpaid, the defendants cut and removed from said lands a large quantity of timber, whereby they became liable to the penalty imposed by said act.

Defendants demurred to the complaint on the ground that the complaint did not state facts sufficient to constitute a cause of action, and that plaintiff had no legal capacity to sue.

Statement of case.

V. P. Abbott for appellants. This action cannot be maintained, because section 17 of chapter 153 of Laws of 1884 does not create any right of civil action, but creates a crime or misdemeanor, and provides a penalty therefor. (Penal Code, §§ 3-6.) If a civil action can be maintained under section 17, it must be brought in the name of the supervisor of the town of Diana under supervision of the county treasurer. (Code of Civil. Pro. § 1926; *Town of Chautauqua v. Gifford*, 8 Hun, 154; *Town of Lewis v. Marshal*', 9 Abb. N. C. 103, S. C., 56 N. Y. 663; *Gleason v. Youman*, 9 Abb. N. C. 108; *Bridges v. Ford*, 92 N. Y. 575.) The town of Diana cannot maintain this action, either in its own name or by the county treasurer, because it has no capacity to receive penalties upon recovery. (1 R. S. [7th ed.] 805; *Lorillard v. Town of Monroe*, 11 N. Y. 392; *Gay'or v. Herrick*, 42 Barb. 74; *People ex re'. Van Keuren v. Town Auditors*, 74 N. Y. 310.) The act of 1884 is a local act applying only to the county of Lewis, and cannot be enlarged in its scope beyond one subject, which subject must be expressed in its title. (Const., art. 3, § 16.) Being an act to enforce the collection of taxes in Lewis county, it can be nothing else. (*Gaskin v. Meek*, 42 N. Y. 188; *People v. Allen*, Id. 119; *People v. Suprs. of Chautauqua*, 43 id. 10; *Huber v. People*, 49 id. 134; *In re Pau'*, 94 id. 197; *In re Lands in Flatbush*, 60 id. 398.) Being complete so far as it relates to the collection of taxes, it may be enforced, with the exception of section 17, which may be disregarded. (*People ex rel. City of Rochester v. Briggs*, 5 N. Y. 565.) It is unconstitutional because it imposes an excessive fine. (Const., art. 1, § 5; *In re Jacobs*, 98 N. Y. 106; *Peop'le v. Marks*, 99 id. 386; *Stewart v. Palmer*, 74 id. 190-194.) It is unconstitutional because in violation of the bill of rights, which guarantees to every man that his property shall not be taken without due process of law. (*People v. Eq Trust Co.*, 96 N. Y. 396.) If this penalty is intended to go into the treasury of the town of Diana, for general purposes, it takes individual property without due process of law. (*Granger v. City of Buffalo*, 6 Abb. N. C. 244.)

Statement of case.

C. S. Mereness for respondent. The legislature has the right to direct the levying of a tax against the property of a town to pay a claim for which no action would lie, and that, notwithstanding, the voters of the town had voted not to pay the claim. (*Town of Guilford v. County of Chenango*, 13 N. Y. 143.) Statutes similar to the one in question have the sanction of the courts. (*People v. Supervisors of Ulster Co.*, 36 Hun, 491, 497.) The statute in question, at most, only restrains waste on the lands in question until the taxes are paid, to that extent it is remedial and entitled to a fair construction, to the end that the object sought to be accomplished, may be accomplished. (Potter's *Dwarris on Statutes*, 247, note 36.) Every intendment is in favor of the constitutionality of legislative enactments; the court will not adopt a doubtful construction for the purpose of invalidating them. (*Kerrigan v. Force*, 68 N. Y. 381.) Where the words are obscure, the intent may be inferred from the cause or necessity of the act. (*People v. Asten*, 62 N. Y. 623.) The infliction of a penalty by the act was not in excess of the power of the legislature. (*Bertholf v. O'Reilly*, 74 N. Y. 509; 24 Hun, 516; *Seward v. Beach*, 29 Barb. 289.) The plaintiff, as county treasurer, was entitled to recover the penalties in question. (*Looney v. Hughes*, 26 N. Y. 514, 517; *Supervisors of Galway v. Stimson*, 4 Hill, 136.) The title of the act is sufficient. (*In re Mayor, etc.*, 50 N. Y. 504, 553; *Sun Ins. Co. v. Mayor, etc.*, 8 id. 241, 253; *Litchfield v. Vernon*, 41 id. 123, 139; *People ex rel. v. Comrs. of Taxes*, 47 id. 501, 505; *In re Astor*, 50 id. 363, 367; *Tift v. City of Buffalo*, 82 id. 204; *In re Knaust*, 101 id. 189, 194.) To justify the courts in declaring a statute unconstitutional, there must be a clear case of conflict with the Constitution and in which there is no rational doubt. (*Roosevelt v. Godard*, 52 Barb. 533; *People v. Bennett*, 54 id. 480; *Macomber v. New York*, 17 Abb. Pr. 35; *Ex parte McCollum*, 1 Cow. 550.) In considering a demurrer, the court is confined to the grounds specified in it, and a demurrer cannot be sustained upon unspecified demurrable defects

Opinion of the Court, per FINCH, J.

appearing upon the face of the complaint. (*Carter v. De Camp*, 40 Hun, 258.)

FINCH, J. Most of the objections to the judgment appealed from have been fully and satisfactorily met by the opinion of the General Term, with which we agree, and to which we refer rather than repeat the discussion. One question, however, has been argued before us which, perhaps, was little pressed at the General Term, and as to which some further expression of opinion seems needed.

The constitutionality of the law under which the judgment against the defendant was rendered is now assailed upon the ground that it is an arbitrary interference with rights of property; and the proposition is maintained that the legislature has no power to make the use of a citizen's property by its owner in his own way a penal or criminal offense. That is too broad a statement. It does not take into account the duty, which the citizen owes to his neighbor and to the state. He may not use his own property so as needlessly to injure or annoy another, and there are numerous cases which forbid an occupation, lawful in itself, because of the injury it inflicts. One may sell and transfer his property freely, but if he transfers it in fraud of his creditors, and with intent to hinder, delay and defraud them, he is guilty of a misdemeanor and amenable to the criminal law. In like manner, as between mortgagor and mortgagee, the latter may restrain by injunction, and enforce, if need be, by the peril of fine and imprisonment, any destruction of timber or stripping of the land, when, by the act, his security is menaced or destroyed.

Something akin to that is the purpose and operation of the Lewis county tax law. Under that the county pays to the state its entire tax for state purposes, taking upon itself the burden and risk of so much as may be uncollected and assuming the sole responsibility of all collections. There are in the county areas of land whose principal and chief value lies in the bark and timber of the hemlock forests. If those trees are felled and stripped of their bark, the substantial value of the land is

Opinion of the Court, per FINCH, J.

gone. When the tax is assessed it becomes a lien on the land, and the law provides that when such taxes have been assessed and have been returned to the comptroller or treasurer as unpaid it shall cease to be lawful for the owner to peel bark or cut timber upon the land or permit others to do such work until the taxes are paid, and a serious penalty is annexed for any infraction of the command. Practically this is no more than saying that one who holds his land subject to a lawful lien, shall not imperil that lien by removing the bark and timber which constitute its chief and principal value, and leave the tax uncollected and incapable of collection, it having been demonstrated by the return to the treasurer that the land has become the only source or means of payment. The law, therefore, is not an unwarrantable interference with rights of property, but simply enforces by an adequate penalty the performance of a duty which is due to the county acting in behalf of the state. It is to be noted that the prohibition and the penalty relate only to such lands as, under the tax laws, can become subject to be returned to the comptroller or, in his stead, to the county treasurer for non-payment of taxes, and attach only when such return has been made. That return is somewhat analogous to the return of an execution unsatisfied, and marks the period when ordinary remedies have failed. The return to the comptroller lays a foundation for the sale of the land for taxes in arrears. Up to that time the owner may freely cut his timber and peel his bark, and use the proceeds to pay his taxes; but if he does not pay and the collector is unable to find any personal property out of which to collect them, and so returns them to the treasurer as unpaid, the proceedings have reached a point where the sale of the lands is the sole remaining resource; and at that point it is competent for the legislature to restrain acts which would strip the land of its sole or chief value and tend to make unavailing the final remedy. Such an enactment does not transcend the legislative power or unwarrantably restrain the citizen's use of his own property.

The judgment should be affirmed, with costs, but with leave

Statement of case.

to the defendants, upon payment of all costs in the courts below, and of this appeal, to serve an answer herein, such costs to be paid and the answer served within twenty days after service upon them of the order herein affirming the judgment.

All concur, except RUGER, Ch. J., not voting.

Judgment accordingly.

111	465
125	418
111	465
154	456
154	462

MARY MACKAY GREENWOOD, Respondent, v. EDMUND F. HOLBROOK et al., Executors, etc., Respondents; ISAAC J. GREENWOOD, Appellant.

One G. died leaving a widow, two daughters and two sons. By his will he gave to his widow "the net income of his estate," real and personal, for life or until she again married. Upon her remarriage the rents, profits, income and interest were during the remainder of her life to be divided between the widow, the daughters and sons, each class to take one-third, and in case of the death of either of the sons or daughters his or her issue were to take the parent's share, and if there was no issue the surviving son or daughter was to take that share. Upon the widow's death the property was to be divided among the children, each to hold the share given during life, and after the death of either the share of the one so dying went to his or her lawful children and to the lawful issue of every child who may have died. In case of the death of either son or daughter without issue the share went to the other son or daughter. The daughters opposed probate of the will, but withdrew their opposition upon an agreement, declared by its terms to be binding on the parties to it "and their respective heirs, executors and administrators," made between the widow, the children of the testator and the husbands of the two daughters, by which she covenanted during widowhood to pay over to each of the children, and in case of the death of either, to his or her "legal representatives," one-eighth of the net income of all the testator's real and personal estate. One of the daughters died leaving a husband and no issue her surviving, also leaving a will, by which she appointed her husband executor and gave him all her property, including her interest in her father's estate. The husband died and his executors claimed the share of the income to which, if living, the wife of their testator would have been entitled under the will of her father. In an action to have the rights of the parties under said agreement determined, *held*, that the term "legal representatives" used in said agreement had the same meaning as the similar terms used in the statute

Statement of case.

of distribution (2 R. S. 96, § 75), i. e., children or their lineal descendants and not executors or administrators; that the general provisions of the will of G. and the scheme of the statute, so far as they relate to or point out the beneficiary or distributee, are the same; that the agreement is to be read as if the provisions of the will, as modified by it, were incorporated in it, and its only effect is to give to the testator's children a larger share of the testator's estate than they would have received under his will, but to be distributed in the same way, and so there being no legal representatives the next of kin of the deceased daughter were entitled to her share.

Greenwood v. Holbrook (42 Hun, 633) reversed.

(Argued October 25, 1888; decided November 27, 1888.)

APPEAL by defendant, Isaac T. Greenwood, from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 31, 1886, which affirmed a judgment of Special Term in favor of the executors of the last will and testament of William W. Wright, deceased. (Reported below, 42 Hun, 633.)

The material facts, other than those stated in the opinion, are as follows :

The plaintiff is the widow of Isaac John Greenwood. He died on the 14th of May, 1865, leaving a widow, two daughters, Sarah B., wife of William A. Martin, and Eliza Jane, wife of William W. Wright, and two sons, Isaac J. Greenwood and Langdon Greenwood. He also left a will by which he gave to the plaintiff during her natural life, or until she again married, the net rents and profits of all his real estate, and the net interest and income of his personal estate. It was offered for probate and opposition made thereto by his daughters and Langdon Greenwood. But the opposition was withdrawn in pursuance of an agreement made September 23, 1865, between the plaintiff, the four children and the husbands of the two daughters. It recited the facts above stated, and in consideration thereof the plaintiff on her part covenanted with the other parties, that during her widowhood she would pay over to each of the four children of John Greenwood one equal eighth part of the net income of all the real and personal

Statement of case.

estate left by him (with certain exceptions not material here), beginning from the decease of the testator, provided they kept certain promises on their part (not now important), and she further agreed that in case of the death of either of the said four children during her widowhood "she would pay the one-eighth part of said income thereby agreed to be paid to the child so dying, to his or her legal representatives, so long as the said covenants and agreements shall be observed, performed and fulfilled as above mentioned."

The agreement was to take effect when the will was admitted to probate, and by its terms is declared to be binding on the parties to it, "and their respective heirs, executors and administrators." The will was thereupon admitted to probate. In April, 1880, Eliza Jane Wright died, leaving her husband surviving, but no issue. By her will her husband was appointed executor and she bequeathed to him all her estate, including such interest as she had acquired from her father. The husband died, and the defendants, Holbrook and Foote, were appointed the executors of his will. Upon this appeal that share alone is in question.

The plaintiff retains the one-eighth share of net income to which, if living, Eliza Jane would be entitled. The defendants, Holbrook and Foote, as executors of William W. Wright, claim it. The defendants, Isaac and Langdon, brothers of Eliza Jane, also claim her share. The plaintiff brought this action to have the rights of the defendants determined as they are declared by the clause of the agreement above quoted. After trial at Special Term, a decree was made adjudging the share of each child to be personal property, and as such subject to her testamentary disposition, and accordingly that the share of Eliza Jane passed under her will to her husband, William W. Wright; and that, as executors of his will, Holbrook and Foote were entitled to it. Isaac J. Greenwood appealed from that judgment to the General Term.

James M. Hunt for appellant. If the words "legal representatives" are used in the agreement as words of limitation,

Statement of case.

and there be nothing in the context to prevent, they should be construed to mean "executors and administrators," but if they are used as words of substitution, they must be construed to mean next of kin. (*Drake v. Pell*, 3 Edw. Ch. 251, 269, 270; *Bridge v. Abbott*, 3 Bro. C. C. 224; *Barnes v. Otley*, 1 M. & K. 465; *Palin v. Hills*, Id. 470; *Tillman v. Davis*, 95 N. Y. 17, 25; *Slosson v. Lynch*, 43 Barb. 158; *In re Hall*, 2 Dem. 116; *Coster v. Butler*, 63 How. 311, 313; *Phyfe v. Phyfe*, 3 Bradf. 45; *McCray v. McCray*, 12 Abb. Pr. 3; *Cotton v. Cotton*, 2 Beav. 67, 69; *Walter v. Makin*, 6 Sim. 148; *Styth v. Monro*, 6 id. 49; 2 Jarman on Wills [R. & T. ed.] 649.) A contract should be so construed that force and effect be given to each and every part of the instrument. (*Wood v. Sheehan*, 68 N. Y. 365, 368; *Ward v. Whitney*, 8 id. 442, 446; *Hamilton v. Taylor*, 18 id. 358; 3 Jarman on Wills, [R. & T. ed.] 707.) The words "legal representatives" here means "next of kin" rather than "executors and administrators," and the agreement being made in modification of Mr. Greewood's will, to which it refers, is to be construed in reference to it; in other words, all the circumstances which were before the parties during the negotiations of the agreement are proper to be considered in its construction. (*Evansville Bk. v. Kaufman*, 93 N. Y. 273, 281; *Western N. Y. L. Ins. Co. v. Clinton*, 66 id. 226, 331; *Colt v. Phoenix F. Ins. Co.*, 54 id. 595; *Wood v. Mitcham*, 92 id. 375, 376; *Quinn v. Hardenbrook*, 54 id. 83, 86.) The obligation to continue the payment of the annuities was doubtless dependent on the covenantees not again attacking the will. But a stranger in blood could not attack the will. (Code of Civ. Pro. §§ 2615, 2617, 2626, 2627.) The husband is not next of kin to the wife, nor her legal representative. (*Keteltas v. Keteltas*, 72 N. Y. 312; *Luce v. Dunham*, 69 id. 36; *Drake v. Gilmore*, 52 id. 389; Code of Civ. Pro. § 1870.) When he takes personal property, of which she has the title at the time of her dying intestate, he takes *jure mariti*, not as next of kin. (*Tillman v. Davis*, 95 N. Y. 17; *Robbins v. McClure*, 100 id. 398.)

Opinion of the Court, per DANFORTH, J.

Clifford A. Hand for respondents. The words "legal representatives," do not import the substitution of next of kin, except by forced interpretation requisite to the giving effect to an intention manifested by those using the words. (2 Jarman on Wills [5 Am. ed.] 654, 660; *Phyfe v. Phyfe*, 3 Bradf. Rep. 45; *Lee v. Dill*, 39 Barb. 520; *Chapman v. Chapman*, 33 Beav. 556; *Taylor v. Beverly*, 1 Coll. 105; *Hinchcliff v. Westwood*, 2 De Gex & Sm. 216; *In re Crawford*, 2 Drew. 230; 118 Mass. 198; *Bridge v. Abbott*, 3 Bro. C. C. 187; *Drake v. Pell*, 3 Edw. Ch. 251; *Walker v. Makin*, 6 Sim. 148; *Cotton v. Cotton*, 2 Beav. 67; *Silliman v. Davis*, 95 N. Y. 17; *Hal'loway v. Clarkson*, 2 Hare, 521.) Ordinarily, and unless otherwise indicated by the context, a husband or wife is not within the class heirs. (*Tillman v. Davis*, 95 N. Y. 17; *Cushman v. Horton*, 59 id. 151; *Keteltas v. Keteltas*, 72 id. 315; *Luce v. Dunham*, 69 id. 39; *Murdock v. Ward*, 67 id. 387.) In the case of Mrs. Wright, the sums payable to her under the agreement were personalty. As such the beneficial right to their enjoyment would, by legal devolution, have passed to the husband in case she had died intestate. (*Barnes v. Underwood*, 47 N. Y. 356.)

DANFORTH, J. We differ from the conclusion of the court below (42 Hun, 633), and are of opinion that the proper construction of the agreement in question requires us to hold that the phrase "legal representatives" contained in it means "next of kin" to the child dying, and not the executors or administrators of that child. It must be conceded that it might mean either, and numerous cases are referred to in support of the contention of each party. No one case is, however, so like the present as to require its adoption, and little instruction would be given by an analysis of the decisions. Each judgment stands upon the construction or interpretation due to the words under examination, as they are looked at in the light of circumstances surrounding the parties to the instrument, and the situation of persons intended to be benefited. The agreement in this case was induced

by a will, in the provisions of which every party to the agreement was concerned.

It relates to property which, except for the agreement, would not go to the defendants, but to the plaintiff, if distributed under the will, or, if that was set aside, would pass according to its nature under the statute of distribution or descent. Both the will and statutes must have been in the minds of the parties, and we may naturally expect some aid from their provisions.

The testator gave to his wife "the net rents and profits of his real estate," and "the net interest and income" of all of his personal estate for life or until she again married. Upon her remarriage the rents, profits, income and interest above referred to were, by the terms of the will, to go, during the remainder of her life, to her, his sons and his daughters, one-third to each class, and in case of the death of either of his sons or daughters during the lifetime of his wife, leaving issue, that issue were to take the share which the parent would have taken; and if there was no issue, then the surviving son or daughter, as the case might be, was to take that share and enjoy it until the wife's death. Upon her death the property was to be divided among the children, each to hold the share given during life, and after the death of either, the share of the one so dying, goes to his or her lawful children, and to the lawful issue of every child who may have previously died, "and in case of the death of either son or daughter, without issue, the share goes to the other son or daughter, as the case may be. It is thus seen, that the children take for life; their issue, if any, absolutely; and if no issue, then the surviving brother or sister. In great detail, this wish of the testator is expressed and several times repeated. If the opposition to the will had continued to a successful end and the property distributed under the statute, the final result indicated by the testator would in like manner have been reached. Under that statute (2 R. S. 96, § 75), after the allotment of a third to the widow, the residue of the estate of an intestate is to be distributed by equal portions among the children and such persons as legally represent such children,"

Opinion of the Court, per DANFORTH, J.

if any of them shall have died before the deceased. "In case there be no widow, then the whole surplus is to be distributed equally to and among the children, and such as legally represent them." In this statute these words mean children or the lineal representatives of the children to the remotest degree, and not executors or administrators. But the term applies only to descendants, and not next of kin. The same statute, however, provides that "if there be no children nor any legal representatives of them," the distribution shall be to "the next of kin of the deceased." Again, the phrase "legal representatives" relates to children or descendants, and not executors or administrators.

The general provisions of the will and the scheme of the statute, so far as they relate to or point out the beneficiary or distributee, are the same. He is, first, the child of the testator or intestate; second, the descendant of the child, if any; third, the next of kin, who, under the facts before us, were brothers and sisters of the deceased child, as in the will they are specifically pointed out as taking when the child died without issue.

We come now to the agreement. The parties to it were the widow and children of the testator. They had before them the will and its provisions and the statute which defined their rights in case the will was set aside. The contestants withdrew opposition and, in terms, accept and confirm the provisions of the will upon the promise of the wife of the testator that she will, during widowhood, pay over to them or their respective "legal representatives" a portion of the income, etc. As to that it is true they take under her and by contract, not under the will or from the testator, but the promise stands in the place of the testament, and in place of the provisions of the statute, and it cannot be supposed that any party intended to give a different direction to the share bargained for than that given by the testator to the bounty he intended to bestow. By the will the wife took during life, or until her remarriage, all the rents, profits and income, the children to receive none until one or the other of these events happened, but when one

Opinion of the Court, per DANFORTH, J.

and then the other event happened, first, the children, then second, their issue, and failing issue, the surviving brother or sister would receive each a portion.

By the promise of the wife, each child and the legal representatives of a child would, during her widowhood, receive one-eighth of those rents, profits and income. The will and the agreement relate to the same property, and provide only a different beneficiary. The agreement is to be read as if it had incorporated the provisions of the will as so modified; and that being so, we think the parties intended only to lessen the widow's share, and increase that going to the beneficiaries named in the will, without intending to give them, in the share so rescued, any other or different estate than that prescribed to them by the testator in the rents, profits and income accruing after the remarriage or death of the widow, or in the other property. The only effect of the agreement, therefore, as we understand it, is to give to them a larger share of the testator's estate than they would have received under his will, but to be distributed in the same way as his own bounty. The words used in the agreement are susceptible of that meaning, and we do not doubt that such was the understanding of the parties. The instrument was prepared in the course of litigation, apparently by advice and aid of counsel, and if framed with the intention we have ascribed to it is well expressed. If the intention had been different, there was no occasion to add any words, for a promise to pay the parties named would, in the case of one dying, have enured to his "executors or administrators," although they were not named, or if out of abundant caution it was thought best to express what would otherwise be implied, it would have been easy and natural to have used those words. If a man binds himself, his executors or administrators are bound, though not named. The parties to the agreement seem to have had both phrases and their interpretations in mind. They wanted to secure from the widow the stipulated portion of the rents and income during her widowhood or life, and on their part were willing to be bound

Statement of case.

to keep the covenants which formed the consideration of her promise. They therefore agree for themselves and "their executors or administrators," and bind her to pay to the children, or in case of death to the "legal representatives" of the one dying. The selection of the latter phrase, in defining the objects of her obligation, does, in view of the situation of the parties, indicate an intention to describe by it the person who should, upon different contingencies, receive and enjoy the fruits of a compromise as the one to whom the money was due and to be paid, and not the person who should merely receive the money for administration. This we regard as a controlling circumstance. The judgment proceeds upon a different theory. It should therefore be reversed, and, as there is no dispute as to the facts, judgment should be entered declaring the next of kin of Eliza Jane Wright entitled to the one-eighth of the income secured to her by the agreement, with costs in this court and in the Supreme Court, upon appeal, to be paid by the respondents Holbrook and Foote to the appellant Isaac J. Greenwood.

All concur, except PECKHAM and GRAY, JJ., dissenting.
Judgment accordingly.

WILLIAM J. REILLY, Appellant, v. THE MAYOR, ALDERMEN
AND COMMONALTY OF THE CITY OF NEW YORK, Respondent.

111	473
115	611

In an action brought to recover an amount claimed by plaintiff to be due him for work done and materials furnished under a contract to regulate and grade a street in the city of New York, the defendant averred in its answer that, upon the estimated quantities of the work to be done, plaintiff was the lowest bidder, but that by reason of "the inadvertence, ignorance, carelessness or error of the surveyor" an error arose whereby the contract, as awarded to plaintiff, required a payment of nearly twice the actual value of the work; that plaintiff, prior to making his bid, knew that the estimate misstated certain items and in bad faith, and with intent to profit by the ignorance of the surveyor, made an unbalanced bid. There was no allegation or proof of a fraudulent collusion between plaintiff and the officers

Statement of case.

of the corporation. The city surveyor testified on the trial that he made his estimates from surface indications and as correctly as he could, but that the nature of the locality was such that any estimate in advance was unreliable. *Held*, that no fraud was established on the part of plaintiff and he was entitled to recover; that he had a right to the benefit of his own knowledge honestly acquired, so long as he did nothing to mislead or deceive the city; that it having invited bids upon the basis of the estimates made, and awarded the contract to one who was the lowest bidder, tested by the proposals, it could not hold the contractor to a performance and then annul the contract because the actual result so varies from the estimates as to make the accepted bid higher than the others; that the lowest bidder under the estimates is the lowest bidder under the law and he does not lose his right because the estimates are erroneous; that having complied with the law and entered into the contract the city could not urge against him its own ignorance or error. The validity of such a contract with the city does not depend upon the accuracy of the officer charged with the duty of making the estimates, but upon an honest effort on his part to be accurate.

In re Anderson (109 N. Y. 554) distinguished

Reilly v. Mayor, etc. (22 J. & S. 463) reversed.

(Argued October 25, 1888; decided November 27, 1888.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made June 23, 1887, which affirmed a judgment in favor of defendant entered upon a verdict directed by the court. (Reported below, 22 J. & S. 463.)

This action was brought to recover a sum claimed to be due as the final payment under a contract between the defendant and plaintiff, for furnishing the materials and doing the work of regulating and grading One Hundred and Eighty-fifth street, in the city of New York. It was not questioned but that, pursuant to an ordinance authorizing it, the work was advertised for in the usual form by the department of public works, and the usual proposals to bidders issued containing estimated quantities of each item of the work. Plaintiff's bid, tested by the estimates, was the lowest, and the contract was awarded to, and was entered into by him; he performed it, and it was accepted by the commission.

The answer conceded that, taking the estimated quantities,

Statement of case.

plaintiff's bid was the lowest, but alleged, in substance, that he was not, in fact, the lowest bidder, and that the prices fixed by the contract for certain portions of the work were much above the fair and reasonable value of the work. The answer also contained the following averments :

"That by reason of the inadvertence, ignorance, carelessness or error of the surveyor employed upon said work, it was estimated that the quantity of earth excavation to be done thereon was much less than the actual quantity of such excavation which was to be done, while the quantity of rock excavation estimated by him was much more than the actual amount of rock excavation which was to be done.

"The defendants, at the time of the bidding upon said work and the execution of the said contract, were entirely ignorant that the quantities of earth excavation and rock excavation were so misstated in said estimate, and in good faith did believe them to be correctly stated.

"That the plaintiff, prior to making proposals for said contract, well knew that said estimate contained such a misstatement of said items, and thereupon, in bad faith and with the intent to profit by the ignorance of the defendant, and the misstatements of the surveyor employed on this behalf, in his proposal offered to perform the work of earth excavation at an exorbitant price, over four times the actual value thereof, and the rock excavation at a merely nominal price ; and by thus practising upon and taking advantage of the said ignorance and misinformation of the defendant, the plaintiff procured the award to him of said alleged contract at prices which, upon the actual amount of work done, required the payment of an aggregate sum of nearly twice the actual value of said work.

"The defendants, therefore, charge and aver that the said alleged contract is fraudulent and void."

It appeared that the estimates differed materially from the actual work done, and that, at the prices bid, if the actual quantities had been correctly stated in the estimates, plaintiff's bid would have been the highest instead of the lowest. Further facts appear in the opinion.

Statement of case.

Wallace Macfarlane for appellant. If the system by which the city states estimated quantities in its proposals and invites bids thereon be legal, it cannot be permitted to set up against a person contracting with it, on its own invitation, strictly in accordance with that system, errors in the estimates to avoid its obligation to pay. Such errors are, at most, only evidence on the question of fraudulent collusion. (*Moore v. Mayor, etc.*, 73 N. Y. 238; *Curnen v. Mayor, etc.*, 79 id. 511; *Appleby v. Mayor, etc.*, 15 How. Pr. 428.) If the defendant's surveyor made a *bona fide* effort to state, as nearly as possible, the quantities of the earth and rock to be excavated, there is no ground for alleging fraud. (*In re Anderson*, 109 N. Y. 554, 558, 559.) The defense alleged in the answer that plaintiff's contract is fraudulent: First, because he knew the estimates were erroneous; and, second, because, with such knowledge, he practiced on defendant's ignorance, is wholly untenable. (*Sherman v. Mayor, etc.*, 1 N. Y. 316; *Devlin v. Mayor, etc.*, 4 Duer, 337.) To authorize the setting aside of a contract made by a municipal officer, on its behalf, on the ground of fraud, the fraud must be clearly proved. (*Baird v. Mayor, etc.*, 96 N. Y. 56.)

D. J. Dean for respondent. The contract with the plaintiff was invalid, because he was not, in point of fact, the lowest bidder for the work which was actually done. (*Brady v. Mayor, etc.*, 20 N. Y. 312, 318; *Appleby v. Mayor, etc.*, 15 How. Pr. 428; *McSpeddon v. Stout*, 4 Abb. Pr. 23; *In re Mahan*, 20 Hun, 301; 81 N. Y. 621; *In re Merriam*, 84 id. 596; *Bigler v. Mayor, etc.*, 5 Abb. N. C. 51; *Smith v. Mayor, etc.*, 10 N. Y. 504.) This court has already adjudged such a contract to be invalid. (*In re Anderson*, 109 N. Y. 554.) It was not needful, however, for us to find that there was actual fraud, but sufficient that all the facts of the case were such as justified an inference of fraud. (*In re P. E. P. School*, 75 N. Y. 324; *Brady v. Mayor, etc.*, 20 id. 312.) In an action upon the assessment by a person assessed, the court will sustain the contention that the contract in question

Opinion of the Court, per FINCH, J.

is invalid, by reason of the failure of the contracting officers to obey the law, which requires them to ascertain the amount of the work to be done as nearly as may be, and procure proposals for the actual work to be done and contract with the lowest bidder therefor, and the contract must, in like manner, be held invalid, when it is made the basis of an action against the corporation. (Dillon on Mun. Corp. §§ 371, 373; *Hodges v. Buffalo*, 2 Denio, 110; *Supervisors v. Bates*, 17 N. Y. 242; *Delafie'd v. Illinois*, 2 Hill, 159, 173; *Bonesteel v. Mayor, etc.*, 22 N. Y. 162; *Albany v. Cunliffe*, 2 id. 165; *Halstead v. Mayor, etc.*, 3 id. 450; *Cornell v. Guilford*, 1 Denio, 510.)

FINCH, J. The doctrine established in *Matter of Anderson* (109 N. Y. 554) does not control the present case. The controversy there was between the city, seeking to enforce an assessment, and the land-owner resisting. The latter succeeded upon the mixed ground of corporate negligence and fraud in the letting of the contract. It appeared that no effort of any kind had been made on behalf of the city to ascertain the extent of the work; and, beyond the computation of areas, the amounts of earth and rock to be severally excavated were fixed by a mere guess, without effort of any kind to obey the statutory requirement that the quantities should be ascertained as nearly as possible. Coupled with this total neglect on the part of the city was an unbalanced bid, and the two facts together, considered in the light of the result, justified an inference of fraud and collusion between contractor and surveyor which made a case of substantial error.

But here the question is between the city and its own contractor, and without any allegation or proof of a fraudulent collusion between the latter and the corporate agents or officials. On the contrary, the error in the estimates is explicitly alleged to have arisen from "the inadvertence, ignorance, carelessness or error of the surveyor," and is not charged to have been a fraudulent act on his part, or the

Opinion of the Court, per FINCH, J.

result of collusion with the contractor. The surveyor testifies that he made his estimate from the surface indications, and as correctly as he could; that what he supposed to be rock turned out to be boulders; and that the formation in the locality of the work is so irregular as to make any estimate in advance unreliable. It does not appear that the contractor influenced that estimate, or knew anything about it when it was made; and the only allegation as to him is that he knew the estimate to be erroneous, and, relying on his own judgment, made an unbalanced bid which gave him the contract as the lowest bidder, while the result of the work showed that he was not such. That state of facts fails to establish a fraud; for, the innocence of the surveyor being conceded, and the absence of any collusion between him and the contractor—which in the *Anderson* case was a possible and reasonable inference—the charge of fraud rests only on the fact that the contractor had a more accurate knowledge of quantities than the surveyor, and “in bad faith” made his bid. Calling names does not alter facts. The contractor had a right to the benefit of his own knowledge honestly acquired, so long as he did nothing to mislead or deceive the city, and there was no bad faith either in the acquisition of his knowledge, or the use of it in guiding his bid. On the contrary, the terms of the contract warned him that the estimates might not be correct, and left him to judge in that respect and at his own peril in making his bid.

Dismissing, therefore, any defense founded on fraud, or dependent upon the total absence of an effort to ascertain quantities as near as possible, the contention remaining is that the plaintiff was not, in fact, the lowest bidder as demonstrated by the results. The doctrine involved in that theory is that the city, having through its surveyor made an estimate founded upon a surface examination of the locality, and being contented with it, may invite bids upon that basis for the actual work to be done, award the contract to one who is the lowest bidder tested by the proposals, hold him to the contract and require of him its performance, and when it has

Opinion of the Court, per FINCH, J.

been completed, annul it because the actual so varies from the estimated result as to make his bid, in fact, higher than others which had seemed to be above his own. We cannot approve that doctrine. Its injustice is very great. Under the law the bids are to be made and the contracts awarded upon estimates of the work to be done, and he who is the lowest bidder upon those estimates is the lowest bidder under the law, and does not lose his right because the estimates are erroneous. He may lose it through fraud, but if guilty of none, the city cannot urge against him its own ignorance or error. The landowner resisting an assessment might justly complain of the city's neglect or carelessness, but the latter cannot plead its own fault when it has complied with the laws requiring estimates to be made, or declare the contract illegal which it made with full knowledge of the facts.

I think the rule is stated fully in accordance with this view in the *Anderson case*. It is there said, in substance, that where the quantities advertised are mere random guesses, without any basis whatever to rest upon, the statute requirement is in no sense obeyed; but "the case would be different if a *bona fide* effort had been made to comply with the ordinance, and there had been a mistake or error as to the quantities of different kinds of materials to be excavated." The rule thus stated does not make the validity of the contract depend upon the result of the work. It does require an effort in good faith to ascertain the quantities. That effort in this case was made. Not its good faith but only its accuracy is assailed. The statute and the ordinance are silent as to the precise mode of arriving at the estimate. Neither require borings to be made or other expensive tests, although in many cases they might be wise precautions. It is enough if the proper officer charged with performance of the duty executes it honestly, makes such examination as in the specified locality he, in good faith, deems sufficient for the purpose, and frames the proposals accordingly. The validity of the contract does not depend upon his accuracy, but upon an honest effort to be accurate.

Statement of case.

For these reasons the judgment should be reversed, and a new trial granted, costs to abide the event.

All concur, RUGER, Ch. J., and GRAY, J., in result.

Judgment reversed.

In the Matter of the Judicial Settlement of the Accounts of
DAVID PATON, as Trustee under the Last Will and Testament
of JOHN KURST, Deceased.

K. died in 1833, leaving a will executed in 1858. His widow, who died later in the same year, and two sons survived him; a daughter mentioned in the will died before the testator. One of the sons was married at the time the will was made; he died before his mother, leaving two sons. By the ninth clause of his will the testator directed that after his wife's death, and his youngest child had arrived at the age of twenty-one years, his executor should sell all that then remained of his estate and divide the net proceeds "equally among the children I may then have or those who may be legally entitled thereto." The fourth clause provided that if the testator's widow marries, the estate is to "descend to the children we now have or may hereafter have, according to the laws of the state of New York." The eleventh clause provided that if either one of his "said children, or any person or persons who may succeed to the interest of them or either," shall contest the will; "such child or children, person or persons shall forfeit her, his or their share, and such share or shares shall be added to the shares of such child, children or persons as shall not interfere with the same, and to be equally divided among the persons last-named, share and share alike." *Held*, that the ninth clause, read together with the other clauses referred to, indicated the understanding of the testator to be that his sons and daughters might not be living at the time of distribution, and that the issue of a deceased son or daughter should share in the proceeds; that, therefore, the children of the testator's deceased son are comprehended in his scheme for the division; also, that, as they derived their right under the testator's will, and not through their deceased father, their mother would not be entitled to a share of the proceeds of the estate.

The word "children" is a flexible one, and in determining as to whether when used in a will, it was intended to be limited strictly to its primary meaning, or was intended to be used in its broader sense as issue, the context may be resorted to, and that meaning should be preferred, when the reason of the thing sustains it, which permits the children of a deceased child to inherit.

Statement of case.

On settlement of the accounts of a testamentary trustee the claim of an administrator, with the will annexed, to commissions was rejected, and the question as to his right to commissions reserved until his accounting as administrator. *Held*, no error.

(Argued October 26, 1888; decided November 27, 1888.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made March 26, 1887, which modified a decree of the surrogate of the county of New York, upon settlement of the accounts of David Paton, as trustee, under the will of John Kurst, deceased, directing the entire surplus of the trust fund, involved in this proceeding, to be paid to John B. Kurst, by directing that one-half thereof should be paid to said John B. Kurst, and the other half should be divided equally between the two sons of his deceased brother Charles H. Kurst, and that the decree, as thus modified, should be affirmed.

The facts, so far as material, are stated in the opinion.

Jesse K. Furlong for John B. Kurst, appellant and respondent. In the construction of the ninth clause of this will, any parts of the will are to be construed in relation to each other, so, if possible, to form one consistent whole. (9 Mod. 154; 2 W. Bl. 976; 1 T. R. 630; 3 M. & Sel. 158; 1 Swanst. 28; 2 Atk. 172; 6 T. R. 314; 2 Taunt. 109; 18 Ves. 421; 6 Moore, 214.) Words occurring more than once in a will (as "children" in the will under examination), should be presumed to be used only in the same sense throughout the entire will. (*Palmer v. Horn*, 84 N. Y. 516; 2 Ch. Cas. 169; Doug. 268; 3 Drew. 472; *Livesay v. Walpole*, 23 W. R. 825.) Whether a general intent or a particular intent expressed in the will is to prevail must depend upon the context of the whole will. (*Mann v. Mann*, 14 Johns. 1; *Jackson v. Luquere*, 3 Cow. 221; *Arcularius v. Geisenhaimer*, 3 Bradf. 114; *Hunter v. Hunter*, 17 Barb. 25, 85; *Young v. Robertson*, 1 Macy H. L. C. 314, 325; *Jenkins v. Hughes*, 8 id. 571.) The construction of a will depends upon the intention of the

Statement of case.

testator, to be ascertained from a full view of everything contained "within the four corners of the instrument." (*Hoxie v. Hoxie*, 7 Paige, 187, 192.) The grandchildren, if they take at all, are not to take collectively more than their father would have taken had he survived the remarriage or death of his mother, Julia Ann Kurst. (*Vincent v. Newhouse*, 83 N. Y. 512.) The word "children" generally means immediate issue, not grandchildren. (*Palmer v. Horn*, 84 N. Y. 516; *Heard v. Horton*, 1 Denio, 165; *Magaw v. Field*, 48 N. Y. 668; *Mowatt v. Carow*, 7 Paige, 328; *Marsh v. Hague*, 1 Edw. 164; *Stires v. Van Rensselaer*, 2 Bradf. 172; *Chrystie v. Phylfe*, 19 N. Y. 344; *In re Hallett*, 8 Paige, 375; *Kirk v. Cushman*, 3 Dem. 242; *Taft v. Taft*, 3 id. 86.)

Thomas Fenton Taylor for David Paton, trustee, etc., et al. The burden is upon John B. Kurst to show not that the language of the will may be construed so as to disinherit the children of his deceased brother, but that the will, expressly or by necessary implication, does disinherit them. (*In re Brown*, 93 N. Y. 299; *Low v. Harmony*, 72 id. 408; *Scott v. Guernsey*, 48 id. 106.) The language to divide "equally between" imports distribution between tenants in common. (*Delafield v. Shipman*, 103 N. Y. 468; *Ashling v. Knowles*, 3 Drewrey 593; *Vinn v. Francis*, 2 Cox, 190; *Bain v. Lescher*, 11 Sim. 397; *Stevenson v. Leslie*, 70 N. Y. 516; *Murphy v. Harvey*, 4 Edw. 131; *Bunner v. Storm*, 1 Sandf. Ch. 357; *Seabury v. Brewer*, 53 Barb. 662; *Clark v. Lynch*, 46 id. 82; *Everitt v. Carman*, 4 Redf. 341; *Myers v. Dudley*, 23 How. 410; *Collins v. Hoxie*, 9 Paige, 81; *Blosson v. Sidway*, 5 Redf. 389; *Lee v. Lee*, 39 Barb. 172; *Shiels v. Stark*, 14 Ga. 429; *Davenport v. Hanbury*, 3 Ves. Ch. 257; 1 Wash. on Real Prop. 553; *In re Verplanck*, 91 N. Y. 439.) Under a gift to descendants equally, issue of every degree are entitled *per capita*. (*Butler v. Stratton*, 3 Bro. C. C. 367; 3 Jarman on Wills, chap. 39, par. 2, 3; *Id.* 761; *Lincoln v. Pelham*, 10 Ves. 166; *Leigh v. Norbury*, 13 id. 338.) The word "children" in this clause may be held to

Opinion of the Court, per GRAY, J.

include grandchildren. (*In re Brown*, 29 Hun, 412; 93 N. Y. 299; *Prowitt v. Rodman*, 37 id. 54; *Van Nostrand v. Moore*, 52 id. 12; *Betsinger v. Chapman*, 88 id. 493.) Even when the language of a will is ambiguous the courts will presume that a testator makes a will because he differs from the statute of descent and distribution of intestates' estates, and, in accordance with that presumption, such ambiguous language will be presumed to have a meaning which will not lead to the application of the estate in accordance with those statutes. (*Murdock v. Ward*, 67 N. Y. 387; *Luce v. Dunham*, 69 id. 36; *Keteltas v. Keteltas*, 72 id. 312; *Prowitt v. Rodman*, 37 id. 39.) The word "or" in the light of testator's intention, as shown by the whole will, and of the loose use of language made by the draughtsman is not used disjunctively to denote mutually exclusive alternatives, or co-ordinately, like a sign of equality, to denote indifferent alternatives or synonymous expressions. (*Horridge v. Furgeson*, Jac. 583; *Mande v. Mandes*, 22 Beav. 290; 1 Wash. on Real. Prop. 553; Style's Rep. 240; 2 Danv. 514, pl. 4; *Lowndes v. Stone*, 4 Ves. 649; *Marwood v. Darrell*, Lee, Cas. T. Hard, 91; *Scott v. Guernsey*, 60 Barb. 163; 48 N. Y. 108; *Low v. Harmony*, 72 id. 408; *In re Brown*, 93 id. 299.) This fund is the proceeds under a power of sale and must be distributed as prescribed by the will itself, or if the will fails to provide, the distribution is fixed by Revised Statutes (§ 98, chap. 1, tit. 2, part 2), and is not controlled by the statutes providing for distribution of surplus "where the deceased shall have died intestate." (*In re O'Connor*, 15 State Rep. 443.) In any event the grandchildren, Charles S. Kurst and George D. Kurst, are entitled to the share under this ninth article which their father would have taken if living. (*De Costa v. Maxwell*, 15 N. Y. State Rep. 283; *Warner v. Durant*, 76 N. Y. 136; *In re Brown*, 29 Hun, 412; *Wright v. Dugan*, 15 Abb. N. C. 107; *Stevenson v. Lesley*, 70 N. Y. 516.)

GRAY, J. The question presented by these appeals is as to the construction to be given to the language in the ninth clause

Opinion of the Court, per GRAY, J.

of the will of John Kurst. The will was made in 1858 and the testator died in 1863. His wife survived him and died later in the same year. At his death there were living two sons; a daughter, Julia, mentioned in the will, having died before testator at the age of nine years. One of the sons, Charles, was married when his father made this will, and he died before his mother, leaving two sons, parties and appellants in this proceeding. The claimants to the fund in the trustee's hands were John B. Kurst, who survived both of his parents, and the two grandsons of testator, sons of his deceased son Charles.

John B. Kurst contended that he alone was entitled to the whole of the fund, and the surrogate sustained him in that contention. The grandsons of testator claimed the right to share in the fund, either *per capita* or *per stirpes*, and the General Term, reversing the surrogate, decided that they were entitled between them to one-half of the fund.

The ninth clause of the will reads as follows:

"*Ninth.* — I order and direct that after the decease of my said wife, and my youngest child shall arrive at the age of twenty-one years, my executor hereinafter named, or such person or persons as may then legally represent my said estate and the interests of my said children, shall dispose of all such property as may then remain of my said estate within eighteen months thereafter, either at public auction or at private sale, as such executor, person or persons may in his or their judgment deem most advantageous and beneficial to my children, and out of the proceeds thereof, after first deducting all necessary expenses, divide the same, together with all other property belonging to my estate, *equally among the children I may then have, or those who may be legally entitled thereto*, excepting, however, from the above disposition of my said estate all my silver spoons, one pianoforte, which I now have, and the portraits of myself, my wife, and my mother, which spoons, pianoforte and portraits I hereby give, devise and bequeath to our daughter, Julia Kurst, her heirs and assigns, forever."

The difficulty arises from the language of the will in this clause, which speaks of a division of the proceeds of the sale

Opinion of the Court, per GRAY, J.

of the estate "equally among the children I may then have, or those who may be legally entitled thereto." The will is evidently not drawn by a hand skilled in the requirements of such an important instrument; but enough appears from its reading to satisfy us that what the testator meant to accomplish was, such a distribution of his property, as that not merely his immediate issue should be benefited, but also the issue of any of his sons and daughters who may have died before his widow. Certainly no words or provisions can be found in the instrument which preclude the issue of a son or daughter from sharing in the testator's estate; if we can give to the word "children," as used, or as understood in the use of the word "those," in this clause, that more comprehensive sense, which will include issue however remote. As Judge STORY said, in the case of *Parkman v. Bowdoin* (1 Sumner, 368), where he reviews a number of authorities from an early date: "Although in its primary sense, the word 'children' is a *descriptio personarum* who are to take, there is not the slightest difficulty in giving it the other sense, when the structure of the devise requires it."

By reference to the fourth clause of the will, we find the provision that in the event of the marriage of testator's wife, his estate is to "descend to the children we now have, or may hereafter have, according to the laws of the state of New York, subject," etc. In the eleventh clause is contained a provision "that if either one of my said children, or any person or persons who may succeed to the interest of them, or either, shall in any way or manner interfere with the due and proper execution of any one of the provisions of this my last will * * * by commencing legal proceedings in relation thereto, such child or children, person or person, shall forfeit her, his or their share in my said estate, and such share or shares shall be added to the shares of such child, children or persons as shall not interfere with the same, and to be equally divided among the persons last-named, share and share alike."

We think that these provisions indicate the understanding of the testator that his sons and daughters might not be living

Opinion of the Court, per GRAY, J.

at the time of distribution, and that an intention is deducible that the issue of a deceased son or daughter should share in the proceeds of the estate, upon the sale ordered by him after the decease of his wife.

It is the province of the court, in the construction of a testamentary disposition of property, to effectuate the intention of the testator by giving that direction to the fund which, with all the light that may be cast upon the matter by the proofs, and from a fair reading and a reasonable interpretation of the writing, in all its parts, seems just. We may not make a will for him, nor thwart his manifest purpose; but if the will before us is equally susceptible of one or another interpretation, we should, on every principle of right, and within the spirit of all the authorities, give it that which is most equitable and consonant with the dictates of justice.

In the Matter of Estate of Brown (93 N. Y. 295), where the question was whether the testamentary provision cut off the issue of a son of a deceased daughter, where the testator had given to each of his daughters a life estate in his property "with remainder over to their respective children," RAPALLO, J., said, if the language of the clause "is capable of any construction which would permit the issue of the deceased son to participate in the remainder limited upon his mother's life estate, that construction should, on well settled principles, be adopted in preference to one which should exclude them."

Chancellor KENT says, in his Commentaries (vol. 4, p. 419n): "Children, as well as issue, may stand, in a collective sense, for grandchildren, where the justice or reason of the case requires it." The word "children" is a flexible expression, and we think that meaning should be preferred, when the reason of the thing sustains it, which permits the children of a deceased child to inherit. (1 Jarman on Wills, 404; *Earl of Tyrone v. Marquis of Waterford*, 1 De Gex, F. & J. 613; *Hodges v. Middleton*, 2 Doug. 431; *Doe v. Webber*, 1 Barn. & Ald. 713; *Prowitt v. Rodman*, 37 N. Y. 42; *Scott v. Guernsey*, 48 id. 106; *Low v. Harmony*, 72 id. 408.)

In determining, in a given case, the meaning to be attached to the expression in a will of "children," we may resort to the context to see if the testator has, by his use of language, or by other provisions of the will, made it a flexible term, or whether its primary meaning attaches strictly. The other clauses, which we have quoted from, would be sufficient warrant to give to the clauses under consideration the wider and juster sense, which will include the children of a deceased son or daughter as participants in the fund arising from the sale of the estate. It seems to us that the word "or," in the sentence in question here, implies a substitution, in case of the predecease of sons or daughters, of their surviving children. When the testator directs a division "equally among the children he may then have, or those who may be legally entitled thereto," he must be regarded as contemplating the possibility of there being other children entitled to share than his immediate offspring. The word "those" must refer to children, in order to have a meaning, and refers to the children or issue of his sons and daughters. By the force of these provisions, the issue of a deceased child of testator is substituted for the child, and that share in the estate would be distributed among such issue *per stirpes*.

Thus, when we consider the testator's intention as to the future distributees of his estate, with the aid of the context and with the interpretation furnished by him in the provisions of other clauses, there seems to exist no doubt that the children of his deceased son are comprehended in his scheme for the division.

As to the claim of the widow of the deceased son of testator to share in the proceeds, we agree with the General Term that she had none. These grandchildren derived their right to the fund under testator's will and not through their deceased father.

On the proceeding before the surrogate the claim of John B. Kurst, as administrator with the will annexed, to commissions was rejected. The ground of the rejection was that the accounting was by Paton as the trustee appointed to carry the will into effect upon the death of the testator's

Statement of case.

wife, and related to the proceeds of the sale made by him of the real estate, and the question of the right of the administrator to commissions was reserved, until his accounting as such administrator. We are unable to find any basis for his claim for commissions in this record, and there is nothing for us to pass upon in that respect. That must be the subject of any further proceedings below.

The judgment of the General Term should be affirmed and the matter remitted to the Surrogate's Court to be proceeded with in conformity therewith. Under the circumstances no costs of the appeal are allowed.

All concur.

Judgment accordingly.

111	488
112	451
111	488
120	177
111	488
156	73

JOSEPH W. PALMER, Respondent, v. THE PENNSYLVANIA COMPANY, Appellant.

To render a railroad corporation liable for injuries to a passenger it is essential to show that the injury was caused by the neglect on its part to perform some duty which, in the exercise of reasonable care, prudence and diligence, it owed to the passenger.

Plaintiff while a passenger on defendant's road, in the night-time, slipped and fell from the platform of a car and was injured. In an action to recover damages there was evidence sufficient to justify a finding that there was a thin covering of snow upon the platform and some slight spots of ice around its edges, both of which had gathered during the trip. It had stormed during the night and the weather was cold and freezing. The platform was well constructed with proper and convenient steps, and with hand rails on either side. *Held*, the evidence failed to establish defendant's liability and a submission of the case to the jury was error.

In such a case the rule holding railroad corporations to the use of the utmost possible care in discovering defects in their tracks and running machinery does not apply. That rule regards simply such appliances as would be likely to occasion great danger and loss of life to the traveling public if defects existed therein.

Weston v. N. Y. E. R. R. Co. (73 N. Y. 595) distinguished.

A railroad corporation is not required to remove immediately and continuously snow and ice on the platforms of cars attached to a train traveling in the night during a continuous storm, or to cover them with sand or

Statement of case.

ashes in such a manner that no slippery places shall be exposed. It can only be held responsible for dangers produced by the elements when they have assumed a dangerous form and it has had an opportunity to remove their effects.

It appeared that plaintiff was aware of the condition of the platform, having passed over it two or three times previous to the accident and having twice slipped thereon, and that he was walking upon it at the time without using the hand rails. *Held*, that if defendant was chargeable with negligence there was contributory negligence on the part of the plaintiff.

(Argued October 26, 1888; decided November 27, 1888.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made December 20, 1886, which affirmed a judgment in favor of plaintiff, entered upon a verdict and affirmed an order denying a motion for a new trial.

This action was brought to recover damages for injuries sustained by plaintiff from slipping and falling from the platform of a car on defendant's road.

The material facts are stated in the opinion.

Homor A. Nelson for appellant. Defendant, having stopped its train safely in a well-lighted station, and provided for plaintiff a platform to alight from, which was well constructed, furnished with suitable hand-rails, and, in all respects, similar to those in use on the best railroads, had done everything which a prudent and sensible person, in a similar situation, would have deemed adequate, in view of the circumstances and the danger to be anticipated, to prevent any injury which might reasonably be expected to occur. This is the full measure of the defendant's liability to the plaintiff. (*Dongan v. Champlain T. Co.*, 56 N. Y. 1; *Crocheron v. N. S. S. I. F. Co.*, Id. 656; *Cleveland v. N. J. S. Co.*, 68 id. 306; *Carpenter v. B. & A. R. R. Co.*, 24 Hun, 104-108; *Loftus v. U. F. Co.*, 84 N. Y. 455-460; *Putnam v. B. & S. A. R. R. Co.*, 55 id. 108-119; *Crafter v. M. R. Co.*, L. R., 1 C. P. 300; 2 Redfield on Railways,

Statement of case.

201; *Moreland v. B. & P. R. R. Co.*, 1 N. E. Rep. [Mass.] 909) 'It is not the duty of the railroad company to furnish some one to aid passengers in alighting from its cars. (*Lafflin v. B. & S. W. R. R. Co.*, 106 N. Y. 137.)

Grant V. Taylor for respondent. Declarations of party in interest imputing to himself negligence, are not a bar to his recovery. (*Dennison v. Miner*, Penn. Com. Pleas, 5 East. Rep. 219.) The jury having found as facts that the defendant was negligent, and the plaintiff was not; that the defendant had opportunities and time (five or six hours) to see the obstruction and abate it, their decision cannot be set aside, the evidence sustaining it fully, and it having been affirmed by the trial justice and General Term, the judgment cannot be reversed. (*Downs v. N. Y. C. R. R. Co.*, 47 N. Y. 88; *Kenney v. Cchoes*, 100 id. 623.) The judge properly charged that the duty defendant owes the public is the utmost possible care to anticipate future accident or disaster, and the utmost possible prudence in guarding against it, and he also charged every request made by defendant's counsel. (Angell's Law of Carriers, §§ 521-524, 568; *Hurlbut v. N. Y. C. R. R. Co.*, 40 N. Y. 145; *Weston v. N. Y. E. R. Co.*, 73 id. 595.) The degree of care was quite different from that imposed upon one who simply permits the public, by a bare license, to go upon his premises. (*Foster v. N. Y. C. & H. R. R. R. Co.*, 108 N. Y. 636; *Brassell v. N. Y. C. & H. R. R. R. Co.*, 84 id. 246; *C. C. C. & I. R. Co. v. Keary*, 3 O. S. 201; *Manville v. C. & Z. R. Co.*, 2 West. L. M. [Ohio] 495.) Where carriers undertake to convey passengers by the powerful and dangerous agency of steam, public policy and safety require that they should be held to the greatest possible care and diligence. Any neglect in such case may deserve the epithet of gross. (*Phila. & Read. R. R. Co. v. Derby*, 14 How. [U. S.] 486; *New World v. King*, 16 id. 451; *Eagle Packet Co. v. Defries*, 34 Am. R. 245.) The plaintiff was entitled to a safe passage out of the car so that he could continue his journey to the place of destination, and he had a right to

Opinion of the Court, per RUGER, Ch. J.

act upon the assumption that every necessary and reasonable precaution would be taken by its proprietors to make it so. (*Foster v. N. Y. C. & H. R. R. Co.*, 108 N. Y., 636; *Archer v. N. Y. & N. H. R. R. Co.*, 106 id. 595; *Dobiechi v. Sharp*, 88 id. 203.) The court correctly charged: "The plaintiff had his leg broken, and his pain and suffering, the doctor's bill, and all the other expenses which necessarily resulted from the accident, enter into the question of damages, which are to be assessed by you in case you find for the plaintiff. As a matter of course, it must be simple compensation." (*Clapp v. H. R. R. Co.*, 19 Barb. 461.)

RUGER, Ch. J. The evidence was quite conflicting as to the presence of any ice on the platform of the car from which the plaintiff fell and broke his leg, and as to the quantity of snow lying thereon; some of the witnesses stating that there was no ice and only so much snow as had apparently been blown in and gathered around the corners and crevices of the platform; and others saying there was some ice formed on the edges of the platform from sleet, hail or rain freezing there, and being thinly covered with a coating of snow. It had stormed at various times during the night and morning, and the weather was cold and freezing. Whatever may have been the testimony it is quite certain that the quantity of either ice or snow, was quite inconsiderable, and perceptible only after some inspection. It also appeared that, such as it was, it had been formed upon the platform of a passenger car attached to a though train running from Chicago to Fort Wayne in the course of its transit between those places. The plaintiff had taken his passage at Chicago for a place beyond Fort Wayne, and had been upon the cars about twelve hours, when about five A. M. they arrived at Mansfield, in the state of Ohio, where the accident occurred.

The jury were undoubtedly authorized to find from the evidence, that there was some snow upon the car platform and some slight spots of ice around its edges, and that the accident was occasioned by the slipping of the defendant on the platform by reason of such ice or snow. There is no claim that

Opinion of the Court, per RUGER, Ch. J.

there were hummocks or bunches of either substance, or that it lay in any other form than as a thin covering upon the platform.

It was also established by the evidence of the plaintiff that he was aware of the condition of the platform at the time of the accident, as he had two or three times during the night crossed over it and observed that it was slippery.

The amount of the verdict rendered in the case is quite reasonable, and as the plaintiff was undoubtedly seriously injured, and was subjected to damage by reason thereof, we should be quite willing to affirm the judgment if it could be done without violating legal principles.

Railroad corporations, however, are not the insurers of the lives or safety of passengers upon their cars, and in order to render them so, it is essential to show that they have neglected the performance of some duty, which, in the exercise of reasonable care, prudence and diligence, they owe to such passengers.

We think the trial court was not justified in applying to this case the rule pertaining to the construction and maintenance of tracks and running machinery by railroad corporations, which holds them to the use of the utmost possible care in discovering and remedying defects therein. That rule is applicable to such appliances of a railroad as would be likely to occasion great danger and loss of life to the traveling public, if defects existed therein on account of the velocity with which cars are moved, and the destructive and irresistible force which accompanies such motion.

No claim is made here but that the road-bed was in good order; the cars constructed upon the usual and customary plan, and provided with all of the conveniences and appliances ordinarily used to afford safety and comfort to their occupants. It had a safe and well-constructed platform, with proper and convenient steps to enable passengers to safely enter or alight therefrom, and hand rails on either side to afford assistance in case of any insecurity in the footing of the passageway. The accident occurred from a cause which is as

common to all other exposed places, as to that of a car platform, and which is inseparable from the nature of a northern climate.

Persons who suppose that they are freed from the exercise of reasonable care and prudence in passing over places exposed to ice and snow in such a climate as ours, upon the assumption that a duty belongs to some other person to keep such place, under all circumstances, absolutely free therefrom, greatly mistake the legal obligations resting upon the parties respectively interested.

The rule laid down by the trial court in *Weston v. New York Elevated Railroad Company*, as approved in 73 New York, 595, in reference to a permanent platform at an elevated railroad station in the city of New York, was that "the defendant was not bound to keep its platform in such a condition that it would have been impossible for any passenger to slip, but in such a condition that a person using ordinary care, which people use when not apprised of danger, would not slip." This was applied in a case where the snow had fallen long before the accident, and an effort had been made by the railroad company to remove it, but it had imperfectly performed that duty. We think even such a rule is not applicable to the removal of snow and ice on cars attached to a railroad train in course of transit, traveling in the night, during a continuous storm. The immediate and continuous removal of all snow and ice from such trains, or the covering of them with sand or ashes in such manner that no slippery places shall be at any time exposed, would be quite impracticable and beyond the duty which a railroad company owes to its passengers. The presence of snow or ice upon exposed places on moving cars is an accident of the hour, and no ordinary diligence could, during the prevalence of a storm, wholly remove its effects from the places exposed to its action, so as to prevent accidents to heedless and inattentive travelers. A passenger on a railroad train has no right to assume that the effects of a continuous storm of snow, sleet, rain or hail will be immediately and effectually removed from the exposed platform of the car

Opinion of the Court, per RUGER, Ch. J.

while making its passage between stations, or the termini of its route, and it would be an obligation beyond a reasonable expectation of performance to require a railroad corporation to do so.

We are not referred to any case laying down the precise degree of care and diligence required of such corporations under such circumstances, but we think it must be somewhat analogous to that imposed upon municipal corporations, in respect to the removal of snow and ice from public streets. Those corporations are required to remove dangerous accumulations of snow or ice in a street or public place within a reasonable time after they have occurred; but they are not to be deemed negligent if they do not remove all traces of such obstructions, when they do not constitute something more than the presence of a danger, arising alone from their inherent quality of being slippery. (*Taylor v. Yonkers*, 105 N. Y. 202; *Kinney v. City of Troy*, 108 N. Y., 570; *Kaveny v. City of Troy*, Id. 572.)

The theory upon which the learned trial judge denied the motion for a nonsuit in this case is undoubtedly expressed in his charge to the jury, in which he says: "If you will pay attention you will understand the enormous responsibility which such a company assumes. The duty it owes the public is the *utmost possible care* to anticipate future accident or disaster, and the *utmost possible prudence* in guarding against it."

Although this portion of the charge was unexcepted to by the defendant, and is, therefore, unavailable to it as an error of law upon this appeal, it may yet be taken as an expression of the views entertained by the court in respect to the law, in refusing to grant the motion to nonsuit presented by the defendant.

It is quite impossible to lay down any general rule applicable to all circumstances, in respect to the degree of care to be observed by a railroad corporation in the removal of ice or snow from its cars, and each case must, therefore, be generally determined by its own peculiar circumstances; but

Opinion of the Court, per RUGER, Ch. J.

it is safe to say that such corporations should not be held responsible for the dangers produced by the elements until they have assumed a dangerous form, and they have had a reasonable opportunity to remove their effects.

Having arrived at the conclusion that the case presented no facts as to the negligence of the defendant which a jury were justified in regarding as proof of negligence, we deem it unnecessary to discuss at length the question of the alleged contributory negligence of the plaintiff. A problem not free from doubt is presented by a verdict, adjudging the defendant guilty of negligence in not observing the danger arising from the presence of snow and ice upon a platform, and yet exonerating the plaintiff from the imputation of contributory negligence in view of the fact that he knew that ice and snow had accumulated on the platform; that he had twice slipped there the same night, and thereafter walked fearlessly over it without availing himself of the protection of hand rails within his reach on both sides of the platform. The same duty which rested upon the defendant to see and remove this obstruction rested upon the plaintiff, with still greater force, to guard himself from injury while passing over it, because he had been informed by experience of its presence and danger, and as the storm continued until the train reached Mansfield, he should have known, that no reasonable opportunity had been afforded the railroad company to effectually remove it.

The judgments of the courts below should, therefore, be reversed, and a new trial ordered, with cost to abide the event.

All concur.

Judgment reversed.

Statement of case.

THEODORE C. BALLOU, Appellant, v. THE STATE OF NEW YORK, Respondent.

Upon hearing of a claim presented by B. to the Board of Claims these facts appeared. Prior to 1840 there was a sewer in J. street in the city of U., constructed by or under the authority of the city, into which the owners of lots adjoining the street drained their respective lots. In that year the state constructed a sewer in said street for the purpose of conducting the water from a weigh-lock on the Erie canal, and took up the old sewer. Those engaged in the construction of the state sewer requested the adjoining lot owners to point out places where they desired openings to be left in the sewer so that their drains could be connected therewith. In compliance with this request the complainant, who owned an adjoining lot, pointed out the places for such openings opposite his lot. The openings were left accordingly and through them the claimant thereafter drained his lot. Since the construction of the state sewer there has been no other sewer in the street or any other means by which the lots could be drained. In 1876 the state sewer became obstructed by deposits therein, causing the water to set back into the basement of a store on the claimant's premises. He gave the superintendent of the canal notice of this occurrence, requesting him to close the gate at the weigh-lock. This request was not complied with, and no action was taken on the part of the state to repair the sewer or remove the obstructions. Thereafter the water from the sewer again came into the basement, doing the damage complained of. The board decided that the claimant was not entitled to any damages. *Held*, error; that the state was bound to use reasonable care in keeping the sewer in repair, and in its management; and for damages caused by a neglect to perform this duty it was properly chargeable.

(Argued October 26, 1888; decided November 27, 1888.)

APPEAL from an award of the Board of Claims, made January 14, 1886, which awarded "nothing" on a claim for damages sustained by the testator of the claimant.

In December, 1877, the claimant was, and for about twenty years prior thereto had been, the owner of a parcel of land situate at the corner of John and Main streets in the city of Utica, known as "Ballou block." In the years 1876 and 1877 a portion of the block was occupied by the firm of John C. Hieber & Co., who were engaged in the business of buying

Statement of case.

and selling drygoods. Prior to the year 1840 there was a sewer in John street constructed by or under the authority of the city into which the property owners along that street, including the claimant, drained their respective lots. About the year 1840 the state constructed a weigh-lock upon the Erie canal at or near the head of John street. After that, for the purpose of exhausting the water in the lock when boats passed into the same to be weighed, the state, by its duly authorized officers, agents and servants, constructed a sewer from the weigh-lock through the center of John street to the Mohawk river, so that the water discharged from the lock might be conveyed into the river. At the time of the construction of that sewer the city sewer was taken up, and since then there has not been any other than the state sewer in that street, which took the place of the former sewer, nor any other means by which the lots along that street could be drained. The parties engaged in the construction of the state sewer requested the claimant during the construction of the sewer to point out where he, the claimant, would have openings made therein, and thereupon the claimant did point out the places for such openings, which were left in the sewer accordingly, and from that time the claimant has drained his lot through such openings into that sewer. From the completion of the sewer the claimant had no trouble with or water from the sewer in or upon his premises until the year 1876, when water came from the sewer into the basement of a store upon his premises and caused him some damage. He then gave the superintendent of the canal at Utica notice of the occurrence and requested him to close the gate in the weigh-lock which opened into the same, which request was unheeded. About the 5th and 6th days of December, 1877, the water from the sewer again came into the same basement and damaged the goods therein of the occupant, Hieber & Co., the tenants of the claimant, more than \$1,200. By the terms of the lease between the claimant and Hieber & Co., he had agreed

Statement of case.

to pay them for any damage they might sustain from any backwater from the sewer. The claimant settled with Hieber & Co., and paid them for their damage the sum of \$1,200 receiving from them a release of all claims against him, they, however, reserving the balance of their claim for damages against the state, the total amount of which they claimed was more than \$1,200. Thereafter Hieber & Co. duly assigned their claim for the damages so paid to them to the claimant. In December 1877, the claimant caused the sewer to be examined and found obstructions therein sufficient to dam up and set back the water therein, and he caused the obstruction to be removed and since then the basement of the claimant's store has not been flooded with water. There was no proof of any contract on the part of the state with the city of Utica by which the state agreed or obligated itself to keep open and in good condition the state sewer for the benefit of the individual property holders along the line thereof.

Seymour & Weaver for appellant. The state is liable in all cases where the same facts would create a legal liability against an individual or a corporation. (Laws of 1870, chap. 321, p. 749; Laws of 1883, chap. 205, § 13, p. 211; *Sipple v. State*, 99 N. Y. 284.) Irrespective of the obligation of the state to furnish safe and proper sewage to the claimant, it was bound to so use its own as not to injure another's property; and having been notified of the defect, it was guilty of negligence in not removing the obstruction and keeping its aqueduct in repair. The damage was immediate and direct, and the state is liable therefor. (*Sipple v. State*, 99 N. Y. 284; *Comstock v. N. Y. C. & H. R. R. Co.*, 48 Hun, 225; *Noonan v. Albany*, 79 N. Y. 470; *Jutte v. Hughes*, 67 id. 267, 272; *Harrison v. G. N. R. Co.*, 3 Hurls. & Colt. 231; *Haynes v. Burlington*, 38 Vt. 350; *Bellows v. Sackett*, 15 Barb. 96; 3 Black. Com. 208; *Reed v. State*, 108 id. 407.) By taking up the city sewer and substituting for it a structure of its own, into which abutting owners were directed to drain, the state virtually assumed the obligation of furnish-

Statement of case.

ing the city and abutting owners safe and sufficient drainage in place of that which it had taken from them. (*Barton v. Syracuse*, 36 N. Y. 54; *Nims v. City of Troy*, 59 id. 500, 508; *Mayor, etc. v. Furze*, 3 Hill, 612; 2 Dillon on Munic. Corp. 802; *Child v. Boston*, 4 Allen, 41.) The building of an additional drain by the claimant, entering the state sewer at a point lower down, was an honest effort to get below the obstruction and avoid another overflow. It did not change the claimant's rights or the obligations of the state, and is no defense to the present claim. (*Comstock v. N. Y. C. & H. R. R. Co.*, 48 Hun, 227.)

Chas. F. Tabor, attorney-general, for respondent. The state is not liable, in a proceeding against it, for negligence, unless it has assumed such a liability by positive statute. (*Lewis v. State*, 96 N. Y. 71.) For the destruction of the old sewer, and the taking possession of its site for its own structure, the state was perhaps liable to make compensation in damages to the city, if the claim had been filed within the time allowed by law. (*Marks v. State*, 97 N. Y. 572.) The adjacent owners had no property rights in the old sewer, for the destruction of which they would have a claim against the state. (*Radcliff v. Mayor, etc.*, 4 N. Y. 195; *Moyer v. N. Y. C. R. R. Co.*, 88 id. 351; *Victory v. Baker*, 67 id. 366; *Waffle v. N. Y. C. R. R. Co.*, 53 id. 11.) The privilege, therefore, which the claimant had of draining his cellar into this sewer, rested upon the license or permission only. It was not a privilege which had ripened or could ripen into a prescriptive right. Especially is this true as against the state. (*Burbank v. Fay*, 65 N. Y. 57; *Dermott v. People*, 99 id. 101.) Mere omissions, when not connected with a legal duty, are not the subject of action. (Wharton on Negligence, § 82.) A suit will not lie, on the part of an individual, for damages arising from the unskillful or defective construction of a public sewer, where such damages result directly to the party injured by his use of it for his private convenience. (*Nicholson v. E. R. Co.*, 41 N. Y. 525;

Opinion of the Court, per EARL, J.

Sutton v. N. Y. C. & H. R. R. Co., 66 id. 244; *Converse v. Walker*, 30 Hun, 596; *Larmore v. Crown Point Iron Co.*, 101 N. Y. 391; *Moyer v. N. Y. C. & H. R. R. Co.*, 88 id. 351; *Splitdorf v. State*, 108 id. 205.) The state cannot, without its own consent, be held legally or equitably liable to an assignee for part, and to the original creditor, or other assignee, for another part of the claim. (*James v. City of Newton*, 142 Mass. 366; *Palmer v. Merrill*, 6 Cush. 282; *Mulford v. Hodges*, 10 Hun, 79; *Field v. Mayor, etc.*, 6 N. Y. 188.) The claimant's offer to show by the witness Kinsinger that one of the men who went into the sewer when he came out said "that he found the water above the obstruction to be over the top of his rubber boots; two or three feet deep," was properly excluded, being mere hearsay, and no part of the *res gestæ*. (*Waldell v. N. Y. C. & H. R. R. Co.*, 95 N. Y. 274.)

EARL, J. It seems to us that the claim rejected by the Board of Claims is meritorious and has foundation in law. There is no conflict in the evidence, and all the questions that arise thereon are questions of law.

Before 1840 there was a lawful sewer in John street constructed for the benefit of owners of lots upon that street, and probably at their expense. Such owners had the right to drain their lots into that sewer, and were lawfully doing so when the state, in or about 1840, came there and took up that sewer and substituted its sewer in the place thereof. There was no other sewer in that street but the state sewer, and it was practically impossible to have any other there; and there was no way to drain the lots upon that street, except into that sewer. If it had been necessary for the purposes of the state that it should have the exclusive right of a sewer in that street and its exclusive use, it would have been necessary for the state to condemn, by the exercise of the power of eminent domain, the interests and easements of the property owners in so much of the street as was needed for the sewer. It could not have taken the land and destroyed the right of

Opinion of the Court, per EARL, J.

drainage without making compensation to the abutting owners. There is no claim that the state took any condemnation proceedings, and it is clear that it did not intend to acquire any exclusive use of a sewer in that street. It constructed the sewer not only for its use, but also for the use of the lot owners. The use of the sewer for draining the adjoining lots was perfectly consistent with the purposes of the state, and it is clear that all it intended to do was to substitute its sewer, a larger one, in the place of the city sewer. It cannot be assumed that it intended to do an unnecessary injury to the property owners. So, finding the drains from the adjoining lots into the city sewer, the agents of the state, in constructing the state sewer, left openings therein for such drains, and, probably, for other drains which had not before existed at such places as the property owners pointed out. These openings were left not merely to give a license to the property owners to drain their lots through them into the sewer, but in recognition of an existing right of drainage, and in the discharge of a duty the state owed to the lot owners. No other view is consistent with the facts. Having thus constructed the sewer with these openings, the state was bound to use reasonable care in keeping the sewer in repair and in its management.

From 1840 to 1876, the claimant suffered no damage from the sewer. In the latter year water came from the sewer into the basement of the claimant's store, and the state had notice of it. The water could be set back through the drain only by some obstruction to the flow of the water in the sewer. The state took no action to repair the sewer or to remove the obstruction. In 1877, the water was again set back through the drain and the obstruction was then discovered by the claimant and removed. Thus the state failed in its duty to the claimant. It cannot be said in answer to the claim of the claimant that he would have suffered no damage if his drain had not been thus connected with the sewer, because he had the right, upon the facts as they now appear, to have his drain there, and it was the duty of the state to keep the water which it dia-

Statement of case.

charged into the sewer, from being dammed up therein, and forced back into the drain. It owed the same duty which a city owning a sewer, and charged with the duty of keeping it in repair, owes to abutting owners. (*Barton v. City of Syracuse*, 36 N. Y. 54; *Nims v. City of Troy*, 59 id. 500.)

Our conclusion, therefore, is that the award of the Board of Claims should be reversed, and a new hearing ordered, costs to abide event.

All concur.

Award reversed.

ALBERT G. GRAHAM, Appellant, v. ARCHIBALD M. GRAHAM
et al., Executors, etc., Respondents.

In an account presented by plaintiff against the estate of his father was an item of \$2,062.50, claimed to be the amount of two certificates of deposit loaned by him to his father in July, 1876. In an action upon the account against the executor defendants claimed and gave evidence tending to show that the certificates were delivered by plaintiff to their testator in part payment of an indebtedness to him, incurred in 1865; this indebtedness plaintiff claimed he paid in 1866. On the trial defendants called M. as a witness and were permitted to prove by him that plaintiff in 1878, after the death of his father, procured witness to draw a receipt under date of April 4, 1866, to which plaintiff was to procure the signature of his father to be forged, acknowledging receipt by the latter of \$6,681.44 to be applied in settlement of said indebtedness. *Held*, no error; that the testimony of M. tended to establish the existence of the indebtedness and that it was unpaid in 1878; and it also strengthened defendant's evidence that the certificates were not transferred as a loan but as a payment.

Also, *held*, it did not affect the materiality of the evidence that the scheme of forgery was originally concocted to aid plaintiff in another suit then pending.

(Argued October 26, 1888; decided November 27, 1888.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made April 17, 1886, which affirmed a judgment in favor of defendants, entered upon the report of a referee.

Statement of case.

This action was brought against defendants as executors of the estate of Henry Graham, deceased, the father of plaintiff, upon an account presented by him against said estate, which had been rejected by the executors. Among the items of the account was one for \$2,062.50, claimed by plaintiff to be the amount of two certificates of deposit loaned by him to his father July 24, 1866. Defendants claimed that the certificates were transferred in part payment of an indebtedness of plaintiff to his father. It appeared that in 1865 the plaintiff, who had entered into a contract with one Peckham for the purchase of a farm, assigned the same to his father as security for the payment of two mortgages upon the farm, which had been taken up by the latter and assigned to him, and for advances made by him in paying the balance due Peckham on the contract. The amount of these advances was \$6,681.44. Peckham, at the request of the father, conveyed the farm to Eliza Graham, the wife of the latter, who held the title at the time of his death. After such death plaintiff commenced an action against Eliza Graham to compel a conveyance of the farm to him, he claiming that the advances had been paid by him. The defendants herein called one Miller as a witness and were permitted to prove by him, under objection and exceptions, the facts stated in the opinion.

H. V. Howland for appellant.

Vandenburg & Saxton for respondents. Any circumstance disclosing conduct on the part of the plaintiff, inconsistent with the fact of defendants' indebtedness to him, raises a presumption against the existence of the fact. (*Savoye v. Warner*, 15 Barb. 282-285.) The question, "Will you state whether you did or did not deliver this \$5,500 to Jacob Waldruff?" was incompetent under section 829 of the Code, as it involved a transaction between plaintiff and his father. (*Brague v. Lord*, 67 N. Y. 495; *Oliver v. Freleigh*, 36 Hun, 633; *Holcomb v. Holcomb*, 95 N. Y. 317, 326.) The admission of a conversation between witness and defendants' testator, about

Opinion of the Court, per ANDREWS, J

which the witness was not competent to speak, but which did not prejudice defendants, is not ground for reversal. (*Rowland v. Hegeman*, 1 Hun, 491.)

ANDREWS, J. The referee rejected the claim made by the plaintiff against the estate of his father as fictitious and fraudulent, and the evidence fully justifies his conclusion. The only point urged for the reversal of the judgment, which has any color of plausibility, arises on the exception to the admission of the testimony of Miller, to the effect, that in December, 1878, after the death of Henry Graham, the plaintiff procured Miller to draw a receipt in his handwriting, under date of April 4, 1866, to which the plaintiff was to procure the signature of Henry Graham, to be forged, acknowledging the receipt by Henry Graham from the plaintiff, in behalf of the plaintiff's wife, of the sum of \$6,681.44, to be applied to satisfy the mortgages on the Peckham farm, and the balance due Peckham on the plaintiff's contract for its purchase. The contract had been assigned by the plaintiff to Henry Graham in 1865, who held it as security for the mortgages taken up by him, and for advances in paying the balance due Peckham on the contract. The conveyance from Peckham was thereafter made to the wife of Henry Graham at the request of the latter.

The testimony of Miller was material to the issue. The plaintiff's account against the estate of his father consisted of a large number of items for property sold and money lent and advanced. Among the items was one for \$2,062.50, claimed by the plaintiff to represent two certificates of deposit for \$1,000 each, and interest to July 24, 1876, which, on that day, he loaned to his father, Henry Graham. Several witnesses were called by the plaintiff to establish this claim. The defendants, on the other hand, gave evidence tending to show that the two certificates were transferred to Henry Graham to apply on the farm debt, and the referee found this to have been the fact. The evidence of Miller of the scheme on the part of the plaintiff to show by a forged receipt that

Statement of case.

this debt was paid in 1866, if credited, tended both to establish the existence of the farm debt, and also that it was unpaid in 1878, when the scheme was concocted. It also strengthened the direct evidence that the certificates were not transferred to Henry Graham as a loan, but as a payment, since it showed that there was a debt owing at that date by the plaintiff to his father. If the plaintiff was then owing a debt of many thousands of dollars to his father which had existed since 1866, it was a circumstance bearing upon plaintiff's claim that in 1876 his father was borrowing from him. It does not affect the materiality of the evidence that the scheme of forgery was originally concocted to aid the plaintiff in his suit brought after his father's death to compel his mother and his brother Archibald to convey the farm to him. The transaction was an admission which was relevant to the issues in this case. The argument of the appellant's counsel is based upon the assumption that the evidence was admitted to contradict the item of \$2,000 in the account charged in May, 1874. But this is a misapprehension.

We find no error in the judgment and it should, therefore, be affirmed.

All concur.

Judgment affirmed.

THE PEOPLE ex rel. THE MAYOR, ALDERMEN AND COMMONALTY
OF THE CITY OF NEW YORK, Respondent, v. THE BOARD OF
ASSESSORS OF THE CITY OF BROOKLYN et al., Appellants.

The property of a municipality, acquired and held for governmental and public uses, and used for public purposes, is not a taxable subject within the purview of the tax laws, unless specially included.

This exemption does not depend upon the origin of the title of the municipality, or the location of the property, but applies whether it was acquired by purchase or voluntary grant, or as the product of taxation, or whether the property is situated within or without the territorial limits of the municipality.

SICKELS—VOL. LXVI. 64

111	505
157	44
111	505
159	432

Statement of case.

In proceedings to review by *certiorari* the determination of the Board of Assessors of the city of Brooklyn in assessing for taxation certain premises used as a ferry landing-place, it appeared that the city of New York has occupied by its agents and trustees for two hundred and fifty years, under a conceded title, the said landing-place, and used it for the convenience of the public as an incident to a ferry franchise granted to it. *Held*, that the authority conferred and the duty imposed by the grant of the ferry franchise presupposes the right to acquire what was essential to its operation and to maintain the ferry, and as it could not be operated without a landing on the Brooklyn side, the franchise conjoined with the ownership of the landing, constituted a ferry property belonging to New York, devoted to public use, and so that it was not taxable.

Also, *held*, the fact that the city of New York operates the ferry through lessees and derives revenue from the rental, and not by its own operation of the ferry, did not make the franchise or the landing taxable.

(Argued November 26, 1888; decided December 4, 1888.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made December 14, 1887, which affirmed an order of Special Term, which set aside and vacated on *certiorari* the decision of the Board of Assessors of the city of Brooklyn in assessing certain premises in said city, owned by the relator and used and occupied as a landing for the Fulton street ferry and leased by it to the Union Ferry Company. (Reported below, 47 Hun, 383.)

The facts, so far as material to the questions discussed, are stated in the opinion.

Almet F. Jenks for appellant. If taxable the land is properly taxed in the city of Brooklyn. (*Lake v. City of Brooklyn*, 43 Barb. 54; *Orr v. City of Brooklyn*, 36 N. Y. 661.) The land is taxable. It is not exempted by express statutory terms. (R. S. part 1, tit. 1, chap. 13; Laws of 1881, chap. 293.) This property right has been judicially construed, and the property held to be such as is liable to taxation as to the city of New York. (*Dunning v. Roerne*, 6 Wend. 655; *Britton v. Mayor, etc.*, 21 How. Pr. 251; *People v. Mayor, etc.*, 32 Barb. 102; *Benson v. Mayor, etc.*, 10 id. 223.) The fact that this land is rented out with the ferry rights does not exclude it from taxation. (*Rochester v. Rush*, 80 N. Y. 306, 307; *People ex*

Statement of case.

rel. v. Forrest, 97 id. 101.) A municipal corporation may hold property in either one of two capacities. If for the purpose of municipal government, or as necessary and useful for that purpose, it is not taxable; if it is used by the city or enjoyed by it in a social or commercial capacity, or for its own profit, it is taxable. (*Bailey v. Mayor, etc.*, 3 Hill, 531; *Lloyd v. Mayor, etc.*, 5 N. Y. 369; *Cooley on Tax.* 173; *Rochester v. Rush*, 30 N. Y. 302, 310; *People ex rel. R. R. Co. v. Batchelor*, 53 id. 128, 141; *Dillon on Mun. Corp.* 571; *United States v. R. R. Co.*, 17 Wall. 322-332; *Louisville v. Comm.*, 1 Duval, 295.) There is no such unity between the ferry franchise and the realty as make an exemption of the franchise from taxation carry exemption to the realty. (*Smith v. Mayor, etc.*, 68 N. Y. 552-555; *Benson v. Mayor, etc.*, 10 Barb. 223; *People v. Mayor, etc.*, 32 id. 102.)

Frederic A. Ward for respondent. A municipal corporation is a political body, and as such one of the agencies of government, and is, therefore, exempt from taxation. (*Dillon on Munic. Corp.* [3d ed.] 614, § 773; *Cooley on Taxation*, 132, note; *Collector v. Day*, 11 Wall. 113; *State v. Gaffney*, 34 N. J. Law Rep. 131-133; *U. S. v. R. R. Co.*, 17 Wall. 322; *Leonard v. City of Brooklyn*, 71 N. Y. 498; *Darlington v. Mayor, etc.*, 31 id. 164; *City of Rochester v. Town of Rush*, 80 id. 309; *Town of West Hartford v. Bd. of Water Comrs.*, 44 Conn. 360; *People v. Doe*, 36 Cal. 220; *Worcester County Case*, 116 Mass. 193; *Wayland v. County Comrs. of Middlesex*, 4 Gray, 500; 2 *Dillon on Munic. Corp.* 717, note to § 615 a, *Mayor, etc.*, v. *Bk. of Tennessee*, 1 Swan. 269; *City of Louisville v. Comm.*, 1 Duval, 297; *People ex rel. Mills Water Works Co. v. Forrest*, 97 N. Y. 97.) The assessed premises are not held by the city of New York as private property. (*U. S. v. R. R. Co.*, 17 Wall. 334.) No property of the city of New York can be named, which is more absolutely public in its necessity, nature and uses than the Fulton ferry. (*Benson v. Mayor, etc.*, 10 Barb. 245; *Starin v. Mayor, etc.*, 106 N. Y. 19; 3 *Kent's Com.* 458; *Mayor, etc. v. Furze*, 3 Hill,

Opinion of the Court, per ANDREWS, J.

612.) The fact that the ferry is operated by the relator, through their lessees, the Union Ferry Company, for a compensation agreed on, does not change its character and make it private property. (*Benson v. Mayor, etc.*, 10 Barb. 223.)

ANDREWS, J. We deem it unnecessary to examine at length the questions presented by this record in view of the elaborate and satisfactory opinions pronounced at the Special and General Terms, and shall content ourselves with a brief statement of what seem to us controlling considerations which justify and require an affirmance of the orders below.

It is to be taken as a conceded fact that the title to the landing place at the foot of Fulton street, Brooklyn, which is the subject of the assessment, is vested in the mayor, aldermen and commonalty of the city of New York. The tax proceedings are based on this assumption. In what manner or at what precise time the city of New York acquired title, does not appear. The ferry (now known as Fulton ferry), running from this landing place to the city of New York, is recognized in the Dongan charter as in existence when that charter was granted. In the protest of the mayor, aldermen and commonalty of the city of New York, presented to Lord Cornbury in 1707, against granting the petition of one Seberingh for a ferry franchise between Nassau Island and the city, it is alleged that the city of New York had possessed and enjoyed the franchise of operating a ferry between Nassau Island and the city of New York for seventy years prior to that time, and the protest refers to the landing place on Nassau Island, used in connection therewith, locating it at the point where the landing, which is the subject of the tax in question, now is. The commencement of this period of seventy years antedates the Dongan charter nearly fifty years. The words of grant of the ferry privilege to the city of New York in the Dongan charter of 1686, and in the Cornbury charter of 1708, and also in the Montgomerie charter of 1730, operated by way of confirmation of existing rights, and were not the foundation of the city's title to the franchise or

Opinion of the Court, per ANDREWS, J.

the landing place. The city of New York, therefore, under an admitted title, the origin of which is not disclosed, has for a period of two hundred and fifty years, occupied by itself, its agents, or lessees, the present landing place in Brooklyn, and used it for the convenience of the public and as an incident to the ferry franchise.

We think the landing place was not taxable, upon the principle that property of a municipality acquired and held for governmental and public uses, and used for public purposes, is not a taxable subject within the purview of the tax laws, unless specially included. It would probably be competent for the legislature to make the landing place taxable in Brooklyn, but not having done so, in terms or by necessary implication, the power to tax the landing cannot be spelled out from general words, subjecting to taxation all real and personal property within the state. This principle of construction is well settled. It proceeds upon obvious public considerations. There would be manifest incongruity in subjecting to taxation, for public purposes, property dedicated to or acquired under legislative authority for public and governmental use. We do not think that the principle that municipal property, devoted to public uses, is not taxable, unless expressly made so by statute, depends upon the origin of the title, whether acquired by purchase or voluntary grant, or as the product of taxation, nor upon its locality, whether situate within or without the territorial limits of the municipality. These considerations may be important in some cases. We prefer, however, to express no opinion on the question whether there is, in principle, a distinction between taxation of the property of a municipality strictly devoted to public uses, and property which it owns, though not acquired for a public use, although it may be held, on the general trust, applicable to all property of the corporation, but the acquisition or holding of which has no essential connection with the public functions of the municipality. It is conceivable, we suppose, that the city of New York might, in satisfaction of a debt, or upon some other consideration, acquire a building lot in Brooklyn, which was not

and could not be specifically devoted to any public use of the city of New York. The question which would be presented in such a case is quite foreign to the present one. The ferry franchise was conferred for a public use. This is clearly recognized in all the charters. Its acceptance by the city imposed a duty corresponding with the privilege granted. The duty to maintain the ferry could not be performed without a landing place on the Brooklyn side, and authority conferred to maintain the ferry presupposes the right to acquire what was essential to its operation. The one thing is an inseparable incident of the other, and the franchise to maintain the ferry in question, conjoined with the ownership of the landing, constitute together a ferry property belonging to the city, devoted to public use, the revenues from which, by ordinance and statute, are irrevocably pledged for the payment of the public debt. (City Ordinances, art. 6, § 52. subd. 6; Laws of 1882, chap. 410, §§ 171; 172.) The supposed hardship to the city of Brooklyn of exempting the landing from taxation while the city bears the burden of maintaining police supervision over it as a part of its territory, if the hardship exists, is an immaterial circumstance. But the city of Brooklyn enjoys compensating advantages in the maintenance of the ferry, and the legislature, following a policy long established, has not subjected the landing to taxation. The fact that the city of New York operates the ferry through lessees and derives its revenues from the rental, and not from the operation of the ferry by its immediate agents and servants, does not make the franchise or the landing taxable. It is to be assumed that the immunity of the property from taxation was in the contemplation of the parties when the lease was made, and was considered by them in fixing its terms. The tax is imposed on the land as the property of the city, and not on the lessees in respect of their interest. Many authorities on the question presented are cited in the opinions below. We refer to a few of them, which we think fully support the conclusions reached. (*Rochester v. Town of Rush*, 80 N. Y. 302; *King v. Inhabitants of Liverpool*, 7 B. & C.

Statement of case.

61; *Darlington v. Mayor, etc.*, 31 N. Y. 164; Cooley on Taxation, 132, note; *The Mayor, etc. v. Furze*, 3 Hill, 612; Dillon on Mun. Corp. [3d ed.] 773, and cases cited.)

The orders of the Special and General Terms should be affirmed.

All concur.

Orders affirmed.

BACHE CUNARD, Respondent, v. CHARLES G. FRANCKLYN,
Appellant.

In an action for the wrongful detention and conversion of personal property, defendant's answer denied the conversion and alleged that plaintiff placed the property with him under an arrangement and with power to use and invest it in transactions on joint account, and that heavy losses were incurred in the course of defendant's management of the estate, of all of which plaintiff had knowledge and was furnished with statements. No affirmative relief was asked by defendant. An application for a bill of particulars of the losses, referred to in defendant's answer, was granted. *Held*, no error; that defendant by setting up the losses in his answer was estopped from denying their materiality on the motion, and that the granting of the motion rested in the discretion of the court. The power of the court to order either plaintiff or defendant to furnish a bill of particulars extends to all descriptions of actions, and the scope of the order is ordinarily a question of discretion, and so not reviewable on appeal.

(Submitted November 27, 1888; decided December 4, 1888.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made March 2, 1888, which affirmed an order of Special Term directing defendant to furnish to plaintiff a bill of particulars. (Reported below, 49 Hun, 233.)

The facts are sufficiently stated in the opinion.

William Allen Butler and *John Notman* for appellant. If the plaintiff objects to the defense as containing evidence in addition to the matter properly pleaded, his remedy was by motion to strike out the redundant matter. (*Al. Ins. Co. v. Cleveland*, 14 How. Pr. 408; *Nelson v. Blanchfield*, 54 Barb. 630; *Parsons v. Hughes*, 9 Paige, 591; *Adams v.*

Statement of case.

Sage, 28 N. Y. 103.) The office of a bill of particulars is to apprise the party of the specific demands of his adversary (*People v. Monroe*, 4 Wend. 200); and to prevent surprise at the trial, and enable the adversary to prepare for trial. (*Moran v. Morrissey*, 28 How. Pr. 101.) It is very unusual to compel a defendant to give a bill of particulars, except where he sets up an affirmative claim. (*Tilton v. Beecher*, 59 N. Y. 176; *Butler v. Mann*, 9 Abb. 49; *Higgenbotham v. Green*, 25 Hun, 214; *Watt v. Watt*, 2 Robt. 685.)

William C. Beecher for respondent. The order is not reviewable in this court, unless it clearly transcends the power of the court granting it, as defined by the general course of practice in regard thereto. (*Witkowski v. Paramore*, 93 N. Y. 467; *Tilton v. Beecher*, 59 id. 180; *Dwight v. Germania Ins. Co.*, 84 id. 493.) The power of the Supreme Court to order bills of particulars extends to all descriptions of actions, and it may be exercised as well in behalf of plaintiff as of defendant. (*Dwight v. Ger. Ins. Co.*, 84 N. Y. 493; *Witkowski v. Paramore*, 93 id. 467; *Kelsey v. Sargent*, 100 id. 602.) An application for such a bill is the appropriate proceeding where a party seeks to be fully apprised of the particulars or circumstances of time or place, of the matters set forth in his opponent's pleadings. (*Tilton v. Beecher*, 59 N. Y. 176; *Dwight v. Ger. Ins. Co.*, 84 id. 493; *Eberhart v. Schuster*, 6 Abb. N. C. 141.) A defendant may be required to serve a bill of particulars as to matter set forth in his answer, which is effectual only as a defense, as well as to matter set up as a counter-claim. (*Kelsey v. Sargent*, 100 N. Y. 602.) A bill of particulars of a defense may be ordered, although the answer sets up a general release. (*Dissoy v. Rust*, 46 Super. Ct. [J. & S.] 374.) The order granting a bill of particulars is discretionary with the court, and will not be reversed on appeal unless there appears to have been an improper exercise of discretion. (*Longden v. Brown*, 1 How. Pr. [N. S.] 338.) The scope of the order is also discretionary, depending upon the circumstances.

Opinion of the Court, per GRAY, J.

(*Witkowski v. Paramore*, 93 N. Y. 467.) The defendant must prove on the trial not only authority, but also that he actually lost the plaintiff's money in such transactions. It is competent for the plaintiff to disprove the alleged losses, and to meet this defense the plaintiff is entitled to be informed of the particulars of such alleged losses. (*Witkowski v. Paramore*, 93 N. Y. 467; *Kelsey v. Sargent*, 100 id. 602.)

GRAY, J. If the court had the power to order a bill of particulars in this action, then its exercise of that power will not be reviewed by us. The purpose of its exercise, in every case, must be deemed to be, as it was said in *Dwight v. Germania Insurance Company* (84 N. Y. 493), "to reach exact justice between the parties, by learning just what is the truth, and to learn what is the truth by giving to each party all reasonable opportunity to produce his own proofs and to meet and sift those of his adversary." There is no restriction upon the power; it extends to all descriptions of actions, where justice demands that a party, whether plaintiff or defendant, should be apprised of the particulars of the facts his adversary expects to prove; and the scope of the order must ordinarily be a question of discretion to be governed by the circumstances. (*Dwight v. Germania Ins. Co.*, *supra*; *Witkowski v. Paramore*, 93 N. Y. 467.) Here the plaintiff has sued the defendant for the wrongful detention and conversion of personal property. The defendant meets the claim by an answer, which, while denying the conversion, also alleges that plaintiff placed his property with defendant under an arrangement and with power to use and invest the same in transactions on joint account, and that heavy losses were incurred in the course of defendant's management of the estate; of all of which the plaintiff had knowledge and was furnished with statements.

No affirmative relief is asked by the defendant; but he has elected to base his defense to the claim upon such allegations, in addition to the denial of the charge. It may have been unnecessary to add those allegations by way of defense; but,

Statement of case.

by so doing, the defendant is estopped from denying their materiality on this motion. Nor can he be heard to complain, if the trial court orders him to furnish the plaintiff with the particulars of the losses alleged in his answer to have been incurred, through his transactions with the funds in his keeping, personal knowledge of which, it is to be presumed, is in him.

The provision of the Code is broad enough to effect its evident design of investing the court with the discretionary power to compel a party to furnish his adversary with further information before trial, than is contained in his pleading, and we think that power may be exercised in such an action as this, when it seems to the court that justice requires its exercise, under the circumstances disclosed by the pleadings and moving papers.

As it does not appear that the court has transcended its power in granting the order appealed from, this appeal should be dismissed with costs.

All concur.

Appeal dismissed.

MICHAEL SHERRY, Appellant, v. JOHN C. CARY, Respondent.

Plaintiff's complaint in an action in a court of record contained seven causes of action, aggregating \$552.50, besides interest. The answer, besides a general denial, set up two counter-claims, aggregating \$561.26, besides interest. These grew out of transactions in no way connected with plaintiff's causes of action, and had not in any way been applied by the parties in reduction of plaintiff's claim. Upon the trial the parties gave evidence in support of each of their respective claims. The jury brought in special findings for the plaintiff on three of the causes of action amounting to \$657.84, and for defendant on one of his counter-claims \$634.26; balance in favor of plaintiff \$23.59. Under the direction of the trial court they rendered a general verdict for the plaintiff for \$23.59. *Held*, that the causes of action and counter-claim so established were subsisting accounts between the parties within the meaning of the provision of the Code of Civil Procedure (§ 2863, subd. 4), declaring that a justice of the peace shall not take cognizance of a civil action "where in a matter of account, the sum total of the accounts of both parties, proved to the

Statement of case.

satisfaction of the justice, exceeds \$400," and as, therefore, the action could not have been commenced and tried in a Justice's Court, the plaintiff was entitled to costs. (§ 3228, subd. 8.)

Sherry v. Cary (23 J. & S. 253) reversed.

(Submitted November 27, 1888; decided December 4, 1888.)

APPEAL from order of the General Term of the Superior Court of the city of New York, made December 6, 1887, which affirmed two orders of Special Term, one denying a motion on the part of plaintiff to vacate a judgment for defendant's costs herein, and for a direction to the clerk to tax plaintiff's costs and enter them in the judgment; the other denying a motion for a retaxation of the costs. (Reported below, 23 J. & S. 253.)

The nature of the action and the material facts are stated in the opinion.

Edward P. Wilder for appellant. The plaintiff is entitled to costs, because the action is one of which no justice of the peace could have taken jurisdiction. (Code, §§ 2863, 3228, subd. 4.) In determining the right to costs, the test question is whether defendant's counter-claims should be regarded as payment or as offsets. (*Fuller v. Conde*, 47 N. Y. 89; *Lablanche v. Kirkpatrick*, 8 Civ. Pro. 343; *Stillwell v. Staples*, 3 Abb. 365; *Boston Mills v. Eull*, 1 Sweeney, 359; *Gilliland v. Campbell*, 18 How. 177; *Glackin v. Zeller*, 52 Barb. 147; Code, § 2863, subd. 4; *Griffin v. Brown*, 35 How Pr. 372; *Crim v. Cronkhite*, 15 id. 250; *Burdick v. Hale*, 17 Week. Dig. 279.) For all purposes of determining which party is entitled to costs, the words "mutual accounts" have been treated as equivalent to reciprocal demands without regard to the nature of the demands, or whether they were proper subjects of bookkeeping or not. (Angell on Lim. 136; *Brady v. Durbrow*, 2 E. D. Smith, 78-81; *Ward v. Ingraham*, 1 id. 538; *Ex parte Mills v. N. Y. C. P.*, 10 Wend. 557; *Hayes v. O'Reilly*, 8 Civ. Pro. 357.

G. Washbourne Smith for respondent. A Justice's Court had jurisdiction of the alleged causes of action. (*Spring Valley S. L. Co. v. Jackson*, 2 Sandf. 622; *Ex parte Mills v.*

Opinion of the Court, per EARL, J.

N. Y. C. P., 10 Wend. 557.) The plaintiff was bound to show before the clerk, as taxing officer, not only that the sum, total of the accounts, as set forth exceeded \$400, but also that the sum total of the accounts of both parties, actually proved upon this trial, was in excess of \$400. (Code of Civ. Pro. § 2863, subd. 4; *Thompson v. Green*, 82 N. Y. 619; 21 Hun, 259; *Brady v. Durbrow*, 2 E. D. Smith, 78; *Fuller v. Conde*, 47 N. Y. 89; *Griffin v. Brown*, 35 How. Pr. 372.)

EARL, J. This action was commenced in the New York Superior Court, and the complaint contained seven causes of action, aggregating \$552.50, as follows:

1. For commission on sale of real estate.....	\$135 50
2. On promise to pay plaintiff his debt against third person if he would not sue.....	157 00
3. For money loaned.....	25 00
4. For procuring tenant.....	50 00
5. For money expended.....	63 00
6. For services as to Vanderbilt's house.....	50 00
7. For services in procuring tenant.....	72 00

The answer, besides denials, set up two counter-claims, aggregating \$561.26, as follows: For work done, \$376.06; money received by plaintiff to defendant's use, \$185.20. The jury rendered a verdict in favor of the plaintiff for \$23.59. Both parties claimed the costs of the action. They were taxed in favor of the defendant, and the question for our determination is which party was entitled to them?

Upon the trial the plaintiff gave evidence to support each of the causes of action alleged in the complaint, and the defendant gave evidence to support each of the counter-claims alleged in the answer. It is undisputed that the jury came into court with their verdict in the following form: "We find for the plaintiff on the first claim, with interest, \$244.34; on the second claim, \$283.50, and the seventh claim, \$130. We find for the defendant on the first claim, with interest, \$634.26, balance in favor of the plaintiff, \$23.59." Under the direction

Opinion of the Court, per EARL, J.

of the trial judge the jury rendered a general verdict in favor of the plaintiff for the balance, \$23.59. Upon these facts it is clear that the plaintiff was entitled to the costs of the action.

It is provided, in subdivision 4 of section 2863 of the Code, that a justice of the peace cannot take cognizance of a civil action "where, in a matter of account, the sum total of the accounts of both parties proved, to the satisfaction of the justice, exceed \$400;" and in subdivision 3, of section 3228, it is provided that the plaintiff, upon a recovery by him in a court of record, shall be entitled to the costs of the action, of course, in such a case. It was incumbent upon the plaintiff herein to show, before he could have the costs taxed in his favor, that the sum total of the account proved, to the satisfaction of the jury, by both parties, exceeded \$400. This he did by the affidavits of his attorney, and abstracts from the stenographer's minutes of the trial. It is true that the trial judge did not permit a special verdict to be entered specifying the different items which entered into the general verdict, and the precise mode by which it was reached. But, nevertheless, the jury came into court and rendered the special findings above mentioned, and they were in no way set aside or annulled by any subsequent action of the jury. The result of the special findings was finally entered as their verdict. This was most satisfactory evidence to show that accounts, aggregating more than \$400, had been proved to the satisfaction of the jury.

The counter-claims alleged by the defendant grew out of independent transactions with the plaintiff, were in no way connected with the causes of action alleged in the complaint, and had not, in any way, been applied by the parties in reduction of the plaintiff's claims. Therefore, the causes of action alleged in the complaint, and the counter-claims alleged in the answer, were, at the time of the trial, so far as they were established by proof, subsisting accounts between the parties within the meaning of subdivision 4, section 2863, of the Code, and the action could not have been commenced and tried in Justice's Court. (*Spring Valley S. & L. Co. v.*

Statement of case.

Jackson, 2 Sandf. 622; *Ex parte Mills v. N. Y. Com. Pleas.*, 10 Wend., 557; *Tablache v. Kirkpatrick*, 8 Civ. Pro. R. 256, 340; *Stilwell v. Staples*, 3 Abb. 365; *Boston Silk, etc., Mills v. Eull*, 1 Sweeney, 359; *Gilliland v. Campbell*, 18 How. 177; *Glackin v. Zeller*, 52 Barb., 147; *Ward v. Ingraham*, 1 E. D. Smith, 538; *Brady v. Durbrow*, 2 id. 78; *Fuller v. Conde*, 47 N. Y. 80.)

From the opinion pronounced at the General Term, it appears that costs were denied the plaintiff by that court, on the ground that he did not show before the clerk, as taxing officer, that the accounts proved, to the satisfaction of the jury, exceeded \$400. But, as we understand the record, he did make that proof.* * * * And the clerk should have taxed the plaintiff's costs, and entered them in the judgment in his favor. (*Tompkins v. Greene*, 21 Hun, 257; affirmed in this court, 82 N. Y. 619.)

We are, therefore, of opinion that the orders of the Special and General Terms should be reversed, the judgment in favor of the defendant for costs vacated, and that the clerk should be directed to tax the plaintiff's costs, who should also recover his subsequent costs in all the courts.

All concur.

Ordered accordingly.

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HELENA DENNERLEIN, Respondent, v. JOHN DENNERLEIN et al., and RICHARD WEBBER, Purchaser, Appellants.

A judgment in a partition suit directed a sale, the description of the premises, after giving the metes and bounds, closed thus: "Containing thirty-one acres, more or less." The notice of sale contained the same description. In a hand-bill issued before the sale in the name of the referee appointed to sell, the boundary lines were omitted and the premises briefly described as the farm of D. "containing thirty-one acres." The sale took place upon the premises and the contract signed

* The omitted portion of the opinion states the substance of the proof on taxation.

Statement of case.

by the purchaser contained the words "more or less." He sought to be relieved from his purchase on the ground that when he bid he had one of the hand-bills in his possession and believed that the premises contained thirty-one acres when, in fact, they contained only twenty-four and three-quarters. *Held*, that the purchaser was chargeable with negligence in failing to obtain full and accurate information, and so relief was properly denied; also, that the matter was one resting in the discretion of the court below and was not reviewable here.

(Argued November 27, 1888; decided December 4, 1888.)

APPEALS by Richard Webber, purchaser, from orders of the General Term of the Supreme Court in the second judicial department, one dated December 13, 1887, which affirmed an order of Special Term denying a motion of said purchaser to be released from his purchase; the other made February 14, 1888, which affirmed an order of Special Term directing a resale, etc. (*Mem.* of decision below, 46 Hun, 561.)

On the 5th day of February, 1887, a judgment in partition was rendered herein, directing referee Banks to sell at public auction, in the usual manner, premises described as follows: "All that certain piece or farm of land bounded and described in a deed of conveyance, from Josiah Briggs and wife to George Dennerlein, bearing date the 10th day of February, 1866, as follows, to wit: All that certain piece or farm of land situate, lying and being in the town and county of Westchester and state of New York, bounded as follows: Beginning at the Bear Swamp lane, leading from Westchester to the Snuff Hills on Bronx river, at the south-west corner of the land adjoining the land late of Thomas Baxter, but now of Michael and Andrew Dunn; thence running northerly, as the stone fence now stands, twenty-one chains and fifteen links; thence easterly to a sharp rock; thence south-easterly in a straight line through the woods to the land late of Simon Paul, but now of James Hauxhurst; thence running, as the fence now stands, southerly to the lands late of John Oakley; thence running along the said lands south-westerly, as the fence now stands, to a white oak stump at the aforesaid road; thence westerly along the Bear Swamp road to the place of beginning,

Statement of case.

containing thirty-one acres, be the same more or less, being the same premises which were conveyed by Frederick Ryer and wife to Josiah Briggs by deed, dated April 1, 1865." In pursuance thereof he gave notice on the 11th of February, 1887, by posting an advertisement, that he would sell the premises, which were described as in the judgment, on the twenty-eighth of March then next. At the sale then made Richard Webber became the purchaser at the price of \$15,000, and paid ten per cent, after subscribing conditions of sale by which it was provided that the balance of the bid should be paid on the twenty-third of April, and in default thereof the premises should be again put up for sale under the direction of the referee, with or without application to the court, as he might elect, and "the purchaser held liable for any deficiency" resulting therefrom, and the costs and expenses of the resale. The purchaser did fail to pay the remainder of the purchase-money, and applied to the court for an order releasing him from the bid, discharging him from all claim in the premises, and directing the referee to repay to him the ten per cent, and also his costs and expenses, amounting to \$470. The court denied the motion, and on application of the plaintiff directed a resale, and "that the purchaser at the first sale pay the deficiency resulting therefrom."

L. E. Prendergast for appellant. The fact of the purchase having been made at judicial sale leaves the purchaser entirely without blame, because, not under any duty to inquire, being entitled to rely on the representations made at the auction and sale. (*Paine v. Upton*, 87 N. Y. 327.) The facts attending and preceding the sale here make a case of representation, afterwards discovered to be untrue and which affected the purchase, and because of which the purchaser should be relieved. (*Paine v. Upton*, 87 N. Y. 331, 332; *Wilson v. Randall*, 67 id. 342; *Belknap v. Sealey*, 14 id. 151.) Courts may relieve purchasers against mere accidents, mistakes or hardships. (*Fisher v. Hersey*, 78 N. Y. 387; *Fairchild v. Fairchild*, 59 How. Pr. 351; *Am. Ins. Co. v. Simers*, 3 Ch. Sent. 70; *Marsh v. Ridgway*, 18

Statement of case.

Abb. Pr. 262; *Veeder v. Fonda*, 3 Paige, 94; *Laight v. Pell*, 1 Edw. 577.) A good objection to the title offered was that the referee failed to publish for liens, and that, therefore, certain liens, to wit: The claims of creditors of George Dennerlein, deceased, are not barred by the sale. (Code, §§ 1562, 1621.) The court will relieve a purchaser where title is doubtful or imperfect, although probable that he may never be disturbed. (*Lee v. Lee*, 27 Hun, 1; *People v. Knick. L. Ins. Co.*, 66 How. Pr. 115; *Beckenburgh v. Nally*, 32 Hun, 161; *Fleming v. Burnham*, 100 N. Y. 1; *Weeks v. Tomes*, 16 Hun, 349; 76 N. Y. 601.) Where gross unfairness would result if the purchase should be enforced, the court lays hold of minor irregularities for the purpose of relief. (*Chapman v. Boetcher*, 27 Hun, 606.) Mr. Webber should have been discharged from his purchase and been returned the ten per cent he paid. (*In re Cavanagh*, 14 Abb. Pr. 261; *Rogers v. McLean*, 31 Barb. 304.)

H. C. Henderson for respondent. The purchaser has accepted the premises and entered into possession as the owner thereof, and has shown no reason why he should be released from his contract. (*Morris Canal Co. v. Emmett*, 9 Paige, 168; *Faure v. Martin*, 3 Seld. 210; *Marvin v. Bennett*, 26 Wend. 169; *Stebbins v. Eddy*, 4 Mason, 414.) The purchaser should furnish affirmative evidence of liens and ask to have them removed, or that he be relieved from the obligations incurred by him as such purchaser. Until this is done he presents no case for the interference of the court. (*Noble v. Cromwell*, 27 How. Pr. 293.) The claim of the widow for dower is superior to any claim against the estate of the deceased, and the sale of the real estate to satisfy her dower divests the lands from the liens of such claims. (*Higbie v. Westlake*, 14 N. Y. 281, 285.) The advertisement by the executor or administrator for claims under the statute does not in any way affect a claim unless presented and rejected. (Code of Civ. Pro. § 2750.)

Opinion of the Court, per DANFORTH, J.

DANFORTH, J. The grounds assigned by the purchaser for the interference of the court were (1.) his belief at the time he bid that the described premises consisted of thirty-one acres, whereas as he afterwards ascertained, they contained only twenty-four and three-quarters acres; (2.) the omission of the referee to advertise for liens on the premises. It appears that in addition to the notice of sale already referred to, a handbill was issued on the seventh of March in the name of the referee, in which the lines of boundary were omitted and the premises briefly described as the farm of "the late John Dennerlein, containing thirty-one acres." The plaintiff says he had one of these handbills in his possession and in bidding relied upon the statement of quantity contained therein. It differs from the advertisement and from the description of quantity in the contract signed by himself and by the referee, in that the latter contains the words "more or less." It does not appear that he had not seen at an earlier time the original and legal advertisement containing those qualifying words.

It is plain that the official advertisement contained nothing likely to mislead. The sale took place upon the premises, and the failure to obtain full and accurate information was solely due to the intending purchaser's own negligence. There was sufficient ambiguity in the notice to call for a survey if definite knowledge as to quantity was material, and the result shows that by the aid of a surveyor it was easily obtained.

The second objection is formal only. If any lien in truth existed, beside those provided for by the decree, or any cloud upon the title, or other fact prejudicial to the title, it should have been set out by the purchaser as ground for relief. Nothing of the kind appears. It is, however, not material to discuss the facts. They have been passed upon by both the Special and the General Terms of the Supreme Court, and there is nothing in the case making either order an exception to the general rule which leaves each court to control, according to its discretion, the mode of executing its own judgment. (*Fisher v. Hersey*, 78 N. Y. 387.)

Statement of case.

Both appeals should, therefore, be dismissed, with costs in this court to the respondent of one appeal only.

All concur.

Appeals dismissed.

JULIA EMMA BURGER, Respondent, v. JOHN BURGER, Jr.,
Executor, etc., Appellant.

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To authorize the General Term to review the facts on an appeal from a surrogate's decree admitting a will to probate, it is not essential that the surrogate's finding of fact should be challenged by an exception, nor is any request to find further facts necessary. An appeal on the facts, as well as on the law, is sufficient to give the appellate court jurisdiction, and an exception to a finding of fact is neither necessary or proper.

The questions which may be raised by exception under the Code of Civil Procedure (§ 2545), permitting an exception to be taken to the ruling of a surrogate upon an issue of fact, are questions of law. The finding of a material fact without evidence, a refusal to pass upon a question of fact, or to find a fact which the evidence conclusively establishes, if properly excepted to, raises a question of law, and to such a ruling an exception is permitted under said section; but it has no relation to findings on controverted facts or to refusals to find facts not conclusively established.

An order of the General Term reversing, on the facts, the decree of the surrogate and directing issues to be tried by a jury, is not reviewable here.

Angevins v. Jackson (103 N. Y. 470) limited and distinguished.

(Argued October 10, 1888; decided December 11, 1888.)

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, made April 19, 1887, which reversed, "for error of fact," a decree of the surrogate of Monroe county admitting to probate the will of John Burger, deceased, and directing a trial by jury of this question: "Was John Burger of sound and disposing mind at the time the will in question was executed?"

W. A. Sutherland for appellant. The General Term had no power on the appeal taken from the surrogate's decree to reverse the decree and order a new trial before a jury. (Code, § 2545.) It had no power to review the facts, and its

Statement of case.

reversal was, therefore, error. (*In re Hood*, 104 N. Y. 103, 108; *In re Kellogg*, Id. 648, 650; *Angevine v. Jackson*, 103 id. 470-472.) Julia Emma Burger, the appellant from the decree of the surrogate admitting the will to probate, and upon whose appeal alone the General Term reversed the decree, was not a party aggrieved within section 2568 of the Code. (*Vandemark v. Vandemark*, 26 Barb. 416; *Ross v. Wigg*, 100 N. Y. 243, 246; *Hall v. Brooks*, 89 id. 33, 36; *Hyatt v. Dusenberry*, 8 Cent. Rep. 78; *Fairbanks v. Corliss*, 1 Abb. 155; *Banta v. Kent*, 4 Week. Dig. 62; *Wheat v. Rice*, 15 id. 104; *People v. Horton*, 64 N. Y. 58.) Jurisdiction to entertain the appeal was not conferred upon the General Term by the fact that the proponent of the will appeared in that court by other counsel and argued the appeal. (*Wilmore v. Flack*, 96 N. Y. 512-518; *McMahon v. Rauhr*, 47 id. 67.) An appeal lies to this court from the judgment of the General Term reversing the surrogate. (*Angevine v. Jackson*, 103 N. Y. 470.) Upon an appeal from the General Term reversing the surrogate, the merits of the controversy are brought before the Court of Appeals, and it becomes the duty of this court to inquire into the facts. (*Hewlett v. Elmer*, 103 N. Y. 156, 166; *In re Ross*, 87 id. 514-516.)

Thomas Raines for respondent. The order states that the decree of the surrogate was reversed upon a question of fact, and directs a trial by jury of the issues. An appeal from such an order will not lie. (Code of Civil Pro. § 2588; *Sutton v. Ray*, 72 N. Y. 482.) The order is not a final order. (*Talbot v. Talbot*, 23 N. Y. 19, 20; Redfield's Surrogate Prac. [3d ed.] 317; 3 R. S. 66, § 55; Id. 509, § 98; 72 N. Y. 483, 484; 3 R. S. [6th ed.] 70, § 82; Code, § 2588; *In re Ross*, 87 N. Y. 516, 517; *Hewlett v. Elmer*, 103 id. 156; *Marvin v. Marvin*, 3 Abb. App. Dec. 192; *Sutton v. Ray*, 72 N. Y. 482.) Should the Court of Appeals reverse the decision of the General Term, it must still send an issue to a jury to be tried. It could not admit the will to probate. (Code of Civ. Pro. § 2588; *Sutton v. Ray*, 72 N. Y. 483, 484.)

Opinion of the Court, per ANDREWS, J.

ANDREWS, J. This is an appeal by the executor of the will of John Burger, deceased, from an order of the General Term, reversing on the facts the decision of the surrogate of Monroe county, admitting the will to probate and directing an issue to be tried by a jury as to the mental capacity of the testator when the will was executed. The appellant *in limine* insists that the General Term had no power to review the finding of the surrogate on the facts, for the reason that there was no sufficient exception in the case. This question involves a consideration of the practice to be pursued on an appeal from the decree of a surrogate in probate cases, in order to enable the General Term to review his decision on the facts. Section 2576 of the Code expressly authorizes an appeal to be taken from the decision of a surrogate "upon questions of law, or upon the facts, or upon both." The contestant in her notice of appeal specified that the appeal was taken both on the law and the facts. The surrogate, after the hearing, made and filed his decision, stating separately his findings of fact and his conclusion of law. He found that the will was duly executed; that at the time the testator was of sound mind, competent to make a will, and fully understood its contents, and was under no restraint; and, as a conclusion of law from these facts, that the will should be admitted to probate. The contestant thereupon excepted in writing to "each and every part of the conclusion of law" found and contained in the decision of the surrogate, and made no other exception to the findings and no requests to find were made by either party.

The exception to the conclusion of law raised simply the question whether, upon the facts found or any supporting facts not specifically found, the conclusion was justified. (*Belknap v. Sealey*, 14 N. Y. 148; *Armstrong v. Du Bois*, 90 id. 97.) The conclusion of the surrogate was plainly in accordance with his findings of fact, and the jurisdiction of the General Term to review the facts or to order issues, if it existed, must rest upon some other basis than this exception. The general power of the Supreme Court at General Term to review the decree of a surrogate admitting a will to probate,

Opinion of the Court, per DANFORTH, J.

DANFORTH, J. The grounds assigned by the purchaser for the interference of the court were (1.) his belief at the time he bid that the described premises consisted of thirty-one acres, whereas as he afterwards ascertained, they contained only twenty-four and three-quarters acres; (2.) the omission of the referee to advertise for liens on the premises. It appears that in addition to the notice of sale already referred to, a handbill was issued on the seventh of March in the name of the referee, in which the lines of boundary were omitted and the premises briefly described as the farm of "the late John Dennerlein, containing thirty-one acres." The plaintiff says he had one of these handbills in his possession and in bidding relied upon the statement of quantity contained therein. It differs from the advertisement and from the description of quantity in the contract signed by himself and by the referee, in that the latter contains the words "more or less." It does not appear that he had not seen at an earlier time the original and legal advertisement containing those qualifying words.

It is plain that the official advertisement contained nothing likely to mislead. The sale took place upon the premises, and the failure to obtain full and accurate information was solely due to the intending purchaser's own negligence. There was sufficient ambiguity in the notice to call for a survey if definite knowledge as to quantity was material, and the result shows that by the aid of a surveyor it was easily obtained.

The second objection is formal only. If any lien in truth existed, beside those provided for by the decree, or any cloud upon the title, or other fact prejudicial to the title, it should have been set out by the purchaser as ground for relief. Nothing of the kind appears. It is, however, not material to discuss the facts. They have been passed upon by both the Special and the General Terms of the Supreme Court, and there is nothing in the case making either order an exception to the general rule which leaves each court to control, according to its discretion, the mode of executing its own judgment. (*Fisher v. Hersey*, 78 N. Y. 387.)

Statement of case.

Both appeals should, therefore, be dismissed, with costs in this court to the respondent of one appeal only.

All concur.

Appeals dismissed.

JULIA EMMA BURGER, Respondent, v. JOHN BURGER, Jr.,
Executer, etc., Appellant.

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141	171

To authorize the General Term to review the facts on an appeal from a surrogate's decree admitting a will to probate, it is not essential that the surrogate's finding of fact should be challenged by an exception, nor is any request to find further facts necessary. An appeal on the facts, as well as on the law, is sufficient to give the appellate court jurisdiction, and an exception to a finding of fact is neither necessary or proper.

The questions which may be raised by exception under the Code of Civil Procedure (§ 2545), permitting an exception to be taken to the ruling of a surrogate upon an issue of fact, are questions of law. The finding of a material fact without evidence, a refusal to pass upon a question of fact, or to find a fact which the evidence conclusively establishes, if properly excepted to, raises a question of law, and to such a ruling an exception is permitted under said section; but it has no relation to findings on controverted facts or to refusals to find facts not conclusively established.

An order of the General Term reversing, on the facts, the decree of the surrogate and directing issues to be tried by a jury, is not reviewable here.

Angevine v. Jackson (108 N. Y. 470) limited and distinguished.

(Argued October 10, 1888; decided December 11, 1888.)

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, made April 19, 1887, which reversed, "for error of fact," a decree of the surrogate of Monroe county admitting to probate the will of John Burger, deceased, and directing a trial by jury of this question: "Was John Burger of sound and disposing mind at the time the will in question was executed?"

W. A. Sutherland for appellant. The General Term had no power on the appeal taken from the surrogate's decree to reverse the decree and order a new trial before a jury. (Code, § 2545.) It had no power to review the facts, and its

Opinion of the Court, per ANDREWS, J.

and to reverse his decree on the facts and order issues to be tried by a jury when in its judgment the decision is contrary to or against the weight of evidence, or the facts are so doubtful that, in the opinion of the General Term, justice will be promoted by a retrial before a jury, is clearly recognized by the Code and is incontestable. (Code, §§ 2576, 2588.) The question is, by what procedure is this power to be invoked and how is the right of a party seeking its exercise regulated? There has always existed in this state in some tribunal a supervisory power over the decisions of a surrogate in probate cases upon the facts. Under the Revised Statutes an appeal was permitted to the circuit judge from a decision of a surrogate admitting or refusing probate of a will, who was authorized to reverse the decision on the law or the facts, and if the reversal was on a question of fact, to direct a feigned issue to be tried by a jury. (2 R. S., 66, §§ 55, 57.) This subject was not affected by the Code of Procedure of 1848, but, by chapter 185, of the laws of that year, the jurisdiction theretofore vested in the circuit judges in probate cases was transferred to the Supreme Court, and was thereafter exercised by the General Term. In the Supreme Court the practice was prescribed by rule 44. It provided that the appeal should be instituted by petition by the party appealing, which should briefly state the general nature of the proceedings and of the sentence, order or decree appealed from, and should specify the fact or facts complained of as erroneous, unless the whole sentence, order or decree was claimed to be so, in which case it was sufficient to so state. It was not, as we understand, necessary under the Revised Statutes, or the practice prescribed by rule 44, after the passage of the act of 1848, that an exception should have been taken by the appellant from the decision of a surrogate admitting a will to probate as a prerequisite to the jurisdiction of the appellate court to pass upon the facts, and, in case of reversal upon the facts, to direct a feigned issue. Under rule 44, the filing of the petition alleging that the decision of the surrogate was

Opinion of the Court, per ANDREWS, J.

erroneous on the facts, raised the question whether his decision was supported by the facts or by the weight of evidence, and enabled the court to consider whether justice required a new trial before a jury. The review was in the nature of a rehearing in equity; and the court examined the case *de novo*, and it was held by the chancellor that the appellate court might allow the parties to introduce new allegations, or further proofs, in analogy to the procedure under the civil law. (*Gardiner v. Gardiner*, 34 N. Y. 164; *Clapp v. Fullerton*, Id. 195; *Devin v. Patchen*, 26 id. 441; *Scribner v. Williams*, 1 Paige, 550.) But it is claimed that the practice has been changed by the Code of Civil Procedure, and that it is now necessary, in order to permit the General Term to review the facts on an appeal from the decision of a surrogate granting probate, that his finding of facts must have been challenged by an exception. This construction is based upon section 2545 of the Code. That section permits an exception to be taken to a ruling of the surrogate on the trial before him of an issue of fact, including a finding or refusal to find upon a question of fact, "in a case where such an exception may be taken to a ruling of the court upon a trial without a jury, upon an issue of fact as prescribed in article 3, of title 1, of chapter 10 of this act," and also to a finding or refusal to find upon a question of fact, made on the settlement of the case. But the questions which may be raised by exception under section 2545 are questions of law. This was stated in the original note to the section, and is rendered plain by reference to the other sections of the Code to which it refers (§§ 992-998). The finding of a material fact without evidence, or a refusal to pass upon a question of fact, or to find a fact which the evidence conclusively establishes, if properly excepted to, raises a question of law for the appellate court, and to such rulings on questions of fact, section 2545 permits an exception. But the section has no relation to findings on controverted facts, or to refusals to find facts not conclusively established, or which are not

Opinion of the Court, per ANDREWS, J.

clearly inferable from the evidence. This construction is in accordance with the uniform construction in analogous cases. (*Potter v. Carpenter*, 71 N. Y. 74; *Stewart v. Morse*, 79 id. 629.) In the present case the surrogate found that the will was the sane act of a competent testator. It is not claimed that there was no evidence to support his finding. But it is insisted by the contestant that the preponderance of evidence was against his conclusion. This contention she had the right to present to the General Term, and that court had the power to determine it and to affirm or reverse the determination of the surrogate thereon, and on reversal to order issues.

The point of practice is, was the contestant bound to except to the surrogate's finding that the testator was sane, or to present a request that he should find that he was insane and incapable of making a valid will, and except to the refusal of the surrogate to find in accordance therewith, in order to enable her to argue the facts at the General Term, and the court to decide upon them? We think not, and are of opinion that the appeal from the decision of the surrogate on the facts as well as the law, was alone sufficient to give the appellate court jurisdiction to review the facts, and that an exception was neither necessary nor proper. In the ordinary case of an action triable by jury, the General Term has power to review the facts, and reverse and order a new trial if justice seems to require it, although there may be evidence to sustain the verdict. But in that case no exception is necessary to give the court jurisdiction. It is necessary, however, that a motion for a new trial should have been made and denied by the court below, for the plain reason that on such a motion the trial judge has, for the first time, an opportunity to pass on the facts, and the party making the motion may, by that means, obtain the necessary relief without an appeal. But an appeal from an order denying the motion gives the appellate court jurisdiction to review the facts, and it does not depend on any exception. (*Matthews v. Meyberg*, 63 N. Y. 656; *Hume v. Mayor, etc.*, 74 id. 268; *Boos v. Ins. Co.*, 64 id. 236.)

We think the true rule under the Code is, that an

Opinion of the Court, per ANDREWS, J.

appeal on the facts from the decree of a surrogate admitting or refusing to admit a will to probate brings up for review in the Supreme Court the question of the sufficiency, weight, or preponderance of evidence, and the general merits of the decision; and that it is not necessary that any exception should have been taken to the findings of fact, or that there should have been any request for findings in order to give the General Term jurisdiction to review the facts, and reverse or affirm the decision of the surrogate thereon. But where the appeal is also upon the law, only such questions of law can be considered as have been properly raised by exception. If an exception was taken to the conclusion of law of the surrogate, it raises the question whether it was justified by the facts found. If taken to a finding of fact, it presents the question whether there was any evidence to sustain the finding. So, where the surrogate refuses to make any finding whatever on a question of fact, or where he makes or refuses to make a ruling upon any question of law, an exception lies and his decision may be reviewed in the appellate court. But an exception to facts found, or to a refusal to find upon a question of fact is only important to entitle the appellant to have a review, first in the Supreme Court, and afterwards in this court, of the strictly legal question which it is the office of an exception to present. But in the Supreme Court the facts are open for review without any exception. An application to a court for a new trial on the facts in no proper sense presents a question of law. It is an appeal to the conscience of the court, and it is asked to consider whether, on the whole facts, a new trial ought not to be had. The review on the facts by the Supreme Court, of a decision of a surrogate admitting a will to probate, still retains, in many features, the character of a rehearing in equity. This is quite clear from section 2586 of the Code, which permits the General Term, on appeal from the surrogate on the facts, to receive further testimony or documentary evidence and appoint a referee, and declares that the appellate court has the same power to decide the questions

Opinion per FINCH, J.

of fact which the surrogate had. We are of opinion, therefore, that the point of jurisdiction of the General Term urged by the appellant is not well taken.

We are not sure that what has been said may not be inconsistent with some expressions in *Angevine v. Jackson* (103 N. Y. 470) but the principle there decided, that there must be an exception in order to raise a question of law in the appellate court, is unquestionably sound. The disposition of the point discussed leaves but little to be said. The General Term has power to reverse on the facts. The case of *Sutton v. Ray* (72 N. Y., 482), conclusively shows that this court will not review the order of the General Term directing issues. The claim that the contestant was not aggrieved by the decision of the surrogate has no force.

We think the proper disposition of the case is to dismiss the appeal, leaving it to stand upon the order of the General Term.

FINCH, J. I am inclined to agree in the result reached by the foregoing opinion, and to modify the doctrine of *Angevine v. Jackson*, so far as to hold that even in probate cases, and notwithstanding the supposed tenor of section 2545, an exception to a finding of fact is neither permissible nor necessary. In that action, nevertheless, our conclusion was correct, because no case was made and settled and signed by the surrogate, as the Code explicitly commands (§ 2576), when the appeal is sought to be taken upon the facts; and the papers did not show that the whole evidence was returned, as the General Terms have required by decisions which we have approved. (*Spence v. Chambers*, 39 Hun, 193; *Porter v. Smith*, 107 N. Y. 531.) While I thus agree that an exception to a finding of fact is not essential to a review of the facts, I am not yet sure that, by attacking the facts, one may review and reverse the final conclusions of law without any exception taken to them, or some of them; or that an exception to such conclusions of law has no wider effect on an appeal to the General Term, where the facts are open to review, than we

Statement of case.

have given it on appeal to this court, where the findings are, in general, conclusive. These questions are not involved in the case at bar, as presented for our consideration, and, while the law may be as intimated, I prefer to reserve a final judgment upon them till they are necessarily presented.

All concur with ANDREWS, J.; FINCH, J., concurring in result.

Appeal dismissed.

PHILIP DEOBOLD, as Executor, etc., Respondent, v. FREDERICK OPPELMANN, Jr., et al., Appellants.

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152	508
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157	268
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158	253
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170	114

The sureties upon an administrator's bond are his privies, and so are precluded from questioning any lawful order made by the surrogate in proceedings wherein the administrator is a party, if obtained without collusion between him and the next of kin or creditors of the estate.

A decree, therefore, of a surrogate setting aside, on the ground of fraud, a decree rendered on the final accounting of an administrator, which by its terms discharged the sureties, and ordering a further accounting, is binding on the sureties, although they were not served with notice of the application; and the omission to give notice is no defense to an action brought pursuant to an order of the surrogate directing the prosecution of the bond because of the failure of the administrator to pay over a sum directed, on a further accounting, to be paid by him to one of the next of kin.

Nor is it any defense that, pursuant to an agreement made with them at the time the sureties executed the bond, the administrator deposited with them the proceeds of the estate, to be retained until they were discharged from liability on the bond, and with the authority to use the proceeds in their business, they paying interest, and that upon the rendition of the decree discharging them they paid over the amount so deposited.

Such a contract is invalid and gives the sureties no right to retain funds received by virtue of it, and *it seems* an action could be maintained against them by the administrator to reclaim the funds, in case of refusal to pay them over.

A party cannot claim to have been defrauded who has been induced by artifice to do that which the law would have compelled.

The object of an administrator's bond is to relieve the next of kin from the necessity of resorting to the personal liability of a dishonest, negligent or absconding administrator, and so it is the duty of the sureties, not that of the next of kin, to pursue the administrator for money of the estate improperly retained by him.

Statement of case.

When an administrator obtains by fraud a decree awarding the funds of the estate to him and canceling his bond, this, in itself, is a breach of the covenant of the bond that he will faithfully execute his trust, and renders the sureties liable; they cannot stand as innocent parties in relation to an act which they have covenanted shall never be performed.

The employment of the trust fund by an administrator or other trustee for his individual benefit, or as loans to persons engaged in and to be used in business, is illegal and constitutes a *devastavit*, and the funds may be reclaimed by the trustee or the beneficiaries of the trust from anyone receiving them with knowledge of their character.

A transferee from an executor or administrator cannot protect himself from an action brought by the trustee to reclaim the trust fund by showing that such trustee is a legatee under the will or next of kin to the intestate, and thus entitled to an interest in the fund.

An executor or administrator cannot bind the estate to any use of its funds by contract with third persons having knowledge of their character except in the ordinary and usual course of administration.

The next of kin of an intestate are entitled not only to the security afforded by the bond of the administrator, but also to that of the funds of the estate remaining in his hands, and it is unlawful for him to place those funds beyond the reach of the Surrogate's Court, and irreclaimable until after the duties of administration have been performed.

It is no defense, therefore, in an action against a third person to recover possession of such funds, that he holds them by virtue of a contract with the executor or administrator.

(Submitted October 19, 1888; decided December 11, 1888.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 31, 1886, which affirmed a judgment in favor of plaintiff, entered upon a verdict directed by the court, and affirmed an order denying a motion for a new trial.

The nature of the action and the material facts are stated in the opinion.

Ashbel P. Fitch for appellants. The plaintiff must show, to entitle him to a verdict in this action, that in a subsequent proceeding to which the defendants were parties, the liability of the defendants on the bond was restored. (*Browning v. Vanderhofer*, 4 Abb. N. C. 166.) Of two innocent parties, that one must suffer who puts it in the power of the third person to do the act which caused the injury. (*Greenleaf v.*

Statement of case.

Stanton, 6 Week. Dig. 33; *Manufacturers and Traders' Bank v. Hazard*, 30 N. Y. 326.)

George F. Langbein for respondent. The arrangement or agreement between the sureties and the administratrix for indemnity was void as against public policy. (*Poultney v. Randall*, 9 Bosw. 234; *Wilder v. Butterfield*, 50 How. Pr. 386; *Hill on Trustees*, 266; *Higgins v. Healey*, 47 N. Y. Supr. Ct. [15 J. & S.] 209; *Seaman v. Duryea*, 11 N. Y. 330.) The sureties were not innocent third parties. (Theobald on Principal and Surety, 1; *Hill on Trustees*, 266; *Cushing v. Gore*, 15 Mass. 60; *Stewart v. Eden*, 2 Caines, 121; 14 Am. L. Rev. 339; *Jones v. Quinnipiak Bk.*, 29 Conn. 15; *Dudley v. Hawley*, 40 Barb. 397; *Hoffman v. Carson*, 22 Wend. 285; *Cobbs v. Dow*, 9 Barb. 230; *Ely v. Ehle*, 3 Comst. 506; 1 Smith's L. C. 488; *Stanley v. Gaylord*, 1 Cusl. 550; *Platt v. Tuttle*, 23 Conn. 233; *Justice v. Mundell*, 14 B. Monroe, 12; *Sprights, Exr. of Dudley v. Hawley*, 39 N. Y. 441; *Hunter v. H. R. I. & M. Co.*, 20 Barb. 493, 494; *Moore v. Payne*, 12 Wend. 123.) If the sureties had a right to have this estate in the manner in which they had it in their hands, it was their own negligence that they gave it back to the administratrix. (*Devoe v. Fanning*, 2 Johns. Ch. 251; *Gardner v. Ogden*, 22 N. Y. 327; *Linke v. Wilkinson*, 57 id. 445, 451-453; *Pringle v. Phillips*, 5 Sandf. 157; *Danforth v. Vanderwoort*, 4 Duer, 101.) The sureties were never discharged from liability. (7 Wend. 435; 21 id. 270; *Gardner v. Barney*, 24 How. Pr. 467; *Van Gerhard v. Lighte*, 13 Abb. Pr. 101, 103; *Watt v. Reilly*, 62 How. Pr. 351; *In re Van Horn*, 7 Paige, 46; 1 Crary's Spec. Pro. 442; *Keily v. Dusenbury*, 42 N. Y. Supr. Ct. 238; *Westervelt v. Smith*, 2 Duer, 456, 457; *Thayer v. Clark*, 4 Abb. Ct. App. Dec. 391; 48 Barb. 243; *Schofield v. Churchill*, 72 N. Y. 566; *Douglass v. Howland*, 24 Wend. 35; *Jackson v. Griswold*, 4 Hill, 522; *Arnett v. Sherry*, 35 N. Y. 256, 260; *Baggett v. Boulger*, 2 Duer, 160; *Gerould v. Wilson*, 81 N. Y. 583; *W. N. Y. L. Ins. Co. v. Clinton*, 66 id. 331; *Louman v.*

Opinion of the Court, per RUGER, Ch J.

Yates, 37 id. 604; *Gottberger v. Taylor*, 19 id. 150; *Gordon v. McCarthy*, 3 Whart. [Penn.] 407; *Coleman v. Bean*, 1 Abb. Ct. App. Dec. 374; *Lee v. Clark*, 1 Hill, 56, *Buel v. Gordon*, 6 Johns. 126; *Page v. Russel*, 2 M. & S. 551; *Welsh v. Welsh*, 4 id. 333; *Frost v. Carter*, 1 Johns. Cas. 73, 2 Caine's Cases in Error, 310; *Macdonald v. Bovington*, 4 T. R. 825; *Mayor v. Steward*, Burr. 24, 39; *Lucas v. Winton*, 2 Camp. 443; *Ballard v. Burgett*, 40 N. Y. 314; *Belloni v. Freeborn*, 63 id. 387.)

RUGER, Ch. J. This action was brought by the plaintiff as executor of the estate of his mother, Maria Deobold, to recover from the defendants as sureties upon the bond of Louisa Deobold, given upon her appointment as administratrix of the estate of her husband Henry Deobold, a sum of money ordered by the surrogate to be paid to Maria Deobold, as mother and next of kin to the intestate, but which the administratrix refused or neglected to pay. The trial court directed a verdict for the plaintiff, and the judgment entered thereon was affirmed upon appeal. The Supreme Court having granted leave to appeal to this court, the matter comes here for review.

The record presents the following facts, the evidence being practically undisputed. Prior to January 16, 1880, Henry Deobold, a resident of the city of New York, died possessed of personal property of the value of about \$3,300 and leaving him surviving his widow, Louisa Deobold, his mother, Maria Deobold, and brother Philip Deobold, next of kin. On that day the surrogate of New York issued letters of administration upon the estate to the widow, Louisa Deobold, and the defendants became sureties upon her bond for the faithful performance of her duties as such. On December 9, 1882, upon a general accounting before the surrogate by the administratrix, he made a decree finally adjusting her accounts, and discharging the administratrix and her sureties from their bond.

This decree purported to have been based upon a written waiver of notice of the settlement of the estate, signed by Maria and Philip Deobold, and a written assignment by them to the

Opinion of the Court, per RUGER, Ch. J.

administratrix, of all their right, title and interest in the estate of the deceased. Proceedings were thereafter begun by Maria and Philip in Surrogate's Court on January 9, 1883, to set aside the decree rendered on final accounting, upon the ground that it was fraudulently obtained, and that the assignment and waiver of citation were procured from them by the administratrix through fraud and misrepresentation. Such proceedings were thereupon had that the surrogate, on February 20, 1883, made an order vacating, and in all respects setting aside the decree, and the defendants were immediately thereafter served with a copy of such order. Subsequently, upon a further accounting, the surrogate made an order directing the administratrix to pay to Maria Deobold the sum of \$200, and she refusing to pay the same, the surrogate made a further order directing the prosecution of the defendant's bond for the recovery of the amount so ordered to be paid. This suit was brought in pursuance of the latter order. It further appeared that before consenting to act as sureties upon the bond of Louisa Deobold, the defendants required her to deposit with them the entire proceeds of the estate, to be retained until they were discharged from liability upon the bond, and an agreement to that effect was made between her and the defendants. No security was given to the administratrix for the repayment of these moneys by the defendants, and by the understanding of the parties they were to pay interest thereon, and were authorized to use them in their business as brewers. Under this arrangement the administratrix, at the time of the execution of the bond, in January, 1880, deposited with the defendants the sum of \$3,300, the funds of the estate, which they employed in their business until January 16, 1883, when it was repaid by them, together with a loan of \$2,900 and interest, to Louisa Deobold. This payment was made by the defendants after an examination of the decree of the surrogate of December 9, 1882, discharging them from liability on the bond, and after an inspection of the papers upon which such decree was founded. It did not appear that the defendants had actual notice of the proceedings previously

Opinion of the Court, per RUGER, Ch. J.

instituted by Philip and Maria Deobold to set aside such decree for fraud, or that they were made parties thereto.

It further appeared that, in actions instituted on behalf of Philip and Maria Deobold against the administratrix in the Court of Common Pleas of New York, judgments had been obtained by the plaintiffs, respectively, vacating and setting aside the assignments before referred to, as fraudulent and void.

Two questions are presented by the appellants as grounds for the reversal of the judgment below, which may be briefly stated as follows :

First. That the surrogate could not reinstate the defendants in their liability as sureties upon their bond, in proceedings to which they were not parties ; and,

Second. That the agreement by which they were made the custodians of the funds of the estate was binding and lawful and authorized them to retain them until after the discharge of such bond.

As the corollary of the latter proposition, it is urged that having the right to retain them and having paid them out, relying upon the assignment and decree of the surrogate based thereon, the defendants were relieved from the obligation of repaying the same moneys to the plaintiff in this action. We are of the opinion that the claims of the defendants are not maintainable. No question is made but that the surrogate had ample power to set aside his decree for fraud, and require a further accounting by the administratrix as to the estate (Laws of 1870, § 1, chap. 359); but the claim is that the sureties were not bound by the subsequent adjudications of the surrogate, for the reason that they did not have notice of the proceeding.

This claim is clearly untenable. The decree discharging the administratrix and her sureties was, when made, assailable by any party thereby aggrieved, either by motion to set it aside, or by proceedings on appeal. In neither case was it necessary that the sureties should have notice of the proceeding. The sureties are the privies of the administratrix, and

Opinion of the Court, per RUGER, Ch. J.

are precluded from questioning any lawful order made by the surrogate in a proceeding wherein she is a party, if obtained without collusion between such administratrix and the next of kin or creditors of the estate. (*Scofield v. Churchill*, 72 N. Y. 565; *Gerould v. Wilson*, 81 id. 583.)

Their bond contemplates that they shall remain sureties as long as the surrogate retains jurisdiction of the proceedings in administration of the estate, and has power to make valid orders therein affecting the property administered upon.

Of course, the sureties would not be bound by an order which the surrogate had no jurisdiction to make; but so long as his jurisdiction continues the liability of the sureties remains. The very language of the bond provides for orders made in proceedings *inter alios*, and for the liability of the sureties for a non-performance by the administratrix of any decree or order made by the Surrogate's Court. The condition of the bond is that liability shall follow her infidelity to her trust, or disobedience of any lawful order or decree whenever made in the proceedings.

It was, we think, never heard of in practice that sureties on an administrator's bond, should have notice of proceedings in the administration of an intestate's estate.

It could not be claimed that these sureties were entitled to notice of an appeal from the surrogate's decree, or that if an appeal was taken from a decree in favor of an administrator and the decree should be reversed, they would not still remain liable upon their bond. Such bonds are similar to those given in civil actions upon appeals and otherwise, and have always been held to abide the result of the action.

The real question, therefore, is as to the legality of the arrangement made with the defendants in respect to the custody and use of the funds of the estate during the pendency of proceedings in administration, and the effect of the repayment of such moneys by the defendants to the administratrix under the circumstances disclosed in the case. We are of the opinion that any employment of trust funds for

Opinion of the Court, per RUGER, Ch. J.

the individual benefit of a trustee, is forbidden by the rules of equity, and constitutes a *devastavit* authorizing the removal of the trustee, and the reclamation of such funds from anyone receiving them with knowledge of their character. The employment and use of such moneys by executors, administrators and other trustees during the continuance of the trust, has been from the earliest times the subject of frequent consideration by the courts, and their decisions have displayed a uniform tendency towards that mode of use, which should afford the greatest security to the fund. Their employment by the trustees in trade, or as loans to persons engaged in such business, or in the prosecution of mercantile, commercial and manufacturing enterprises or speculative adventures, has been uniformly condemned as illegal and as constituting a *devastavit* of the estate. (*Wilmerding v. McKesson*, 103 N. Y. 336; *King v. Talbot*, 40 id. 90; *Fellows v. Longyor*, 91 id. 324; *Wetmore v. Porter*, 92 id. 76.)

So, too, it is the uniform doctrine of the cases, that trust funds so invested by the trustees in the hands of third persons, having knowledge of their trust character, still remain impressed with the obligation of the trust in the hands of the holder, and are subject to be reclaimed by suit in the name of their trustees, or in that of the beneficiaries of the trust, and restored to the trust fund. (*Wilmerding v. McKesson*, *supra*; *Wetmore v. Porter*, *supra*; *Rogers v. Squires*, 98 N. Y. 50; *Clark v. Hougham*, 2 B. & C. 149; *Perry on Trusts*, §§ 828-832; *Williams on Executors*, 801; *Field v. Schieffelin*, 7 Johns. Ch. 150.)

Neither can the transferee of such funds, from an executor or trustee, protect himself from an action brought by the trustee to reclaim them, by showing that such trustee was a legatee under the will or next of kin to the intestate, and thus entitled to an interest in the fund. (*Perry on Trusts*, § 811.) Such interest can become a legal right, in any part of such fund, only after administration has been had, and the decree of the court has provided for division and distribution according to the rules regulating such proceedings.

Opinion of the Court, per RUGER, Ch. J.

We conceive it to be beyond the power of an executor or administrator to bind the estate they represent, to any use of its funds, by contract with third persons having knowledge of the character of the property transferred, except in the ordinary and usual course of administration of the trust, and in furtherance of its objects. The bond in question was executed for the sole purpose of securing the persons interested in the property, the administratrix was about to receive, from any loss which they might sustain through her misconduct or dishonesty, and the defendants were well aware of the character of the transaction. The defendants thereby contracted to become sureties for the faithful performance by her of her duties as such administratrix, and the beneficiaries of the estate thereupon became, under the theory of the law, entitled not only to the security afforded by the bond, but also to that of the funds of the estate remaining in the hands of the administratrix. If this transaction is sanctioned, one of the securities that the law provides to such persons is entirely destroyed, and the funds of the estate are merged in the personal responsibility of the sureties alone, subject to the hazard and casualties which so often attend persons engaged in trade. Estates, in the hands of administrators, are always supposed to be under the immediate control of the Surrogate's Court, and subject from day to day to such orders as it may make in relation thereto. It would be contrary to the policy of the law to allow an administrator, at the outset of his administration, by contract, to place the funds of the estate beyond the reach of the court, and irreclaimable until after all the duties of administration have been performed by the administrator. It would certainly be no excuse to an administrator for disobedience to an order of the surrogate, as to the disposition of any portion of the estate, to allege that it was impossible for him to obey, because he had placed its funds out of his possession. Neither would it be any defense to a third person, in an action by any one having authority to recover possession of such funds, to plead that he held them by virtue of a contract, with a former trustee, entered into with him as such trustee.

Opinion of the Court, per RUGER, Ch. J.

We think this proposition was decided in *Poultney v. Randall* (9 Bosw. 236). There the general guardian of an infant sued the defendant for moneys collected by such defendant, belonging to the estate of the infant, under a power of attorney from the guardian. The defense set up was that he held the money, by virtue of a contract with the guardian to so hold it, as security for his obligation upon the guardian's bond, and that the guardian was insolvent. The court held that the facts pleaded constituted no defense, and that the contract was void upon considerations of public policy and a fraud upon the statute requiring security for the due performance by the guardian of his duties as such.

We can see no material distinction between that case and the case at bar, and approve of the reasons therein alleged for the decision. The case of *Wilder v. Butterfield* (50 How. Pr. 385) is to a similar effect.

But it is claimed that the surrender, after the decree canceling the administratrix's bond, of the funds of the estate held by the defendants, to the administratrix operates as a defense to this action. The principle upon which the appellants make this point is not very clearly presented in their brief, and we are unable to see the exact theory upon which it is based. They do not claim that the plaintiff is estopped from alleging the invalidity of the assignment or of the decree, upon the faith of which the payment was made. They claim, however, that "of two innocent parties, that one must suffer who puts it in the power of the third person to do the act which caused the injury."

This contention is probably based upon the familiar maxim that "when one of two innocent parties must sustain a loss from the fraud of a third, such loss shall fall upon the one, if either, whose act has enabled such fraud to be committed." (Abbott's Digest, vol. 8, maxim 84, and vol. 4, maxim 382.) This maxim has been applied and illustrated in numerous cases in this state, among which are the following: *Sprights v. Hawley* (39 N. Y. 441); *Moore v. Metropolitan Bank* (55 id. 41); *Griswold v. Haven* (25 id. 595); *Exchange Bank v.*

Opinion of the Court, per RUGER, Ch. J.

Monteath (26 id. 505); *Sandford v. Handy* (23 Wend. 268); *Root v. French* (13 id. 572); *Voorhis v. Olmstead* (66 N.Y. 116).

These cases generally relate to the authority of agents whose right to deal with the property of their principals was in dispute, and the maxim has been applied by reason of various peculiar circumstances, which were deemed sufficient to preclude the principal from availing himself of the agent's want of actual authority; but the general principle involved has been applied in many cases where a loss has followed from the negligence of one party which enabled a fraud to be committed upon another. We are of the opinion that the maxim has no application to the case in hand, for the reason that no actionable fraud has been shown to have been committed upon the defendants in this transaction, nor has any loss occurred to them, in consequence of the surrender of the money referred to. It is probably true that the defendants would not have surrendered to the administratrix the funds of the estate in their possession, or have repaid to her the debt which they owed her, except for the decree produced for their inspection; but it is also very clear that they had no right to retain such funds by virtue of their contract with the administratrix, and there was no intention to commit a fraud upon them by the administratrix, in obtaining possession of property to which she was legally entitled. She was entitled to the repayment of her loan as a matter of course, for she held a promissory note therefor, payable on demand, and no possible defense could be made to its collection. Neither, as we have seen, could they have resisted a claim made by her, or others, for the reclamation of the money of the estate.

They have done nothing, therefore, in consequence of the decree except what they were under legal obligation to do, and have, therefore, suffered no legal loss or injury from the transaction. The surrender of the property in question would not even have furnished a good consideration for a promise made by the administratrix. (*Vanderbilt v. Schreyer*, 91 N. Y. 392.) It is of the very essence of an action of fraud

Opinion of the Court, per RUGER, Ch. J.

or deceit, that the same should be accompanied by damage, and neither *damnum absque injuria*, or *injuria absque damnum*, by themselves constitute a good cause of action. (*Hutchins v. Hutchins*, 7 Hill, 104; *Michigan v. Phoenix Bk.*, 33 N. Y. 9.) Neither can a party claim to have been defrauded who has been induced by artifice to do that which the law would have otherwise compelled him to perform. (*Thompson v. Menck*, 2 Keyes, 82; *Story v. Conger*, 36 N. Y. 673; *Randall v. Hazeltine*, 12 Allen, 412.)

The defendants may possibly lose the money which they pay in satisfaction of their bond, but this will result from their contract, and the confidence reposed by them in their principal, and not at all from the surrender of the property held by them. It is not probable, however, that they will lose anything as, for all that appears, their principal is perfectly responsible, and liable to indemnify them for any sums they may be obliged to pay on her account.

It affirmatively appears that in January, 1883, she not only had in her possession all the funds of the estate, but also the additional sum of upwards of \$3,000, the result of her own savings during the preceding two or three years, and being an amount largely exceeding the liability of the defendants on their bond.

The main question in the case really seems to be who shall pursue the administratrix for the moneys of the estate improperly retained by her. We think it is the duty of the defendants, as the object of their bond was to relieve the next of kin from the necessity of resorting to the personal liability of a dishonest, negligent or absconding administrator. We are further of the opinion that the defendants are precluded from the benefit of the principle contained in the maxim by reason of the obligations of their bond. They are the privies of their principal and the guarantors of their fidelity in the administration of her trust.

The decree under which the defendants claim discharge from liability was procured by fraud, practiced upon the surrogate, through the presentation of papers fraudulently

Opinion of the Court, per RUGER, Ch. J.

obtained and used by her. It was against the perpetration of such frauds that the defendants' bond was intended to protect the beneficiaries of the estate. The defendants had covenanted that the administratrix should faithfully execute the trust reposed in her, and obey all lawful decrees and orders of the Surrogate's Court. When she obtained, through fraud, the order of the surrogate awarding the moneys of the estate to her, and canceling her bond, she violated the obligations of her trust, and the defendants became liable for the damages flowing from such breach of duty. That the defendants were deceived by the administratrix constituted no protection to them, for they had guaranteed that she should deceive nobody in the administration of her trust. The liability of the sureties is co-extensive with that of the administratrix, and embraces the performance of every duty she is called upon to discharge in the course of administration.

It is quite absurd to say that the very fact which creates a cause of action against the sureties, should also operate as a defense to them. They cannot stand as innocent parties in relation to an act which they have covenanted to the plaintiff, and all others interested, should never be performed. And they have sustained no legal loss when subjected to a liability which they agreed to assume in the event, which is now alleged as the cause of their misfortune.

We are, therefore, of the opinion that the judgments below should be affirmed, with costs.

All concur, except EARL and PECKHAM, JJ., dissenting.

Judgment affirmed.

Statement of case.

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ALBERT GILBERT, Jr., et al., Appellants, v. WARREN D. YORK
et al., Respondents.

The presumption is that a court of limited and inferior jurisdiction is without jurisdiction when the jurisdictional facts are not alleged in a complaint in an action therein.

Under the provision of the state Constitution, as amended in 1873 (art. 6, § 15), and under the provision of the Code of Civil Procedure (§ 340), defining the jurisdiction of County Courts, they are courts of limited and inferior jurisdiction, and so are affected by such presumption.

In an action, therefore, in a County Court to recover a money judgment, an averment in the complaint that the defendant is a resident of the county is necessary. The provision of said Code specifying what must be averred in a complaint (§ 481) is not exclusive.

The omission of such an averment is, under said Code, a ground for demurrer, as the defect appears upon the face of the complaint. (§ 488.)

(Argued November 27, 1888; decided December 11, 1888.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 22, 1886, which affirmed a judgment of the County Court of Chautauqua county, in favor of defendants, entered upon a demurrer to the complaint. (Reported below, 41 Hun, 594.)

The action was upon a money demand.

The complaint did not allege that defendants were residents of the county. The demurrer was, in substance, that the complaint did not state facts showing jurisdiction of the persons of the defendants or of the cause of action, and did not state facts constituting a cause of action.

John Woodward for appellants. A complaint in a County Court is not demurrable, where it does not appear affirmatively on its face that the defendants reside within the county where the action is brought. (Code of Civil Pro. §§ 488, 518, 3447, subd. 4; *People v. Petrea*, 92 N. Y. 145.) By the terms of section 488 the mere absence of facts showing jurisdiction is not made a ground of demurrer. (*Holbrook v. Baker*, 16 Hun, 176; *Phœnix Bk. v. Donnell*, 40 N. Y. 410; *Heenan v. N. Y., W. S. & B. R. R. Co.*, 34 Hun, 602; *Van Dusen*

Opinion of the Court, per ANDREWS, J.

v. *Sweet*, 51 N. Y. 385.) It is a physical and moral absurdity to insert in a complaint an allegation that "at the time of the commencement of the action the defendants reside within the county." (Code of Civil Pro. §§ 316, 340; subd. 3, § 419.)

J. G. Record for respondents. When pleading in a court of inferior or limited jurisdiction, the complaint must show, by proper allegations, every fact necessary to show the plaintiff's right to have his claim adjudicated in a court which does not possess general, original jurisdiction, but which, for certain reasons, he has selected as the court; if he omits those allegations, his complaint does not state facts sufficient to constitute a cause of action, nor does the court have jurisdiction of the person or subject-matter of the action. (*Frees v. Ford*, 6 N. Y. 176; *Judge v. Hall*, 5 Lans. 69; *Continental Ins. Co. v. Rhodes*, 119 U. S. 237; *Piper v. Fordyce*, Id. 469; *McCormick v. Penn. R. R. Co.*, 49 N. Y. 303; *Burns v. O'Neil*, 10 Hun, 494; *Dake v. Miller*, 15 id. 358; *Hamburger v. Baker*, 35 id. 356.)

ANDREWS, J. The case of *Frees v. Ford* (6 N. Y. 176) is a decisive authority upon the question presented in this record, unless the rules of pleading prescribed in the Code of Civil Procedure have changed the rule declared in that case, so that it is now unnecessary in an action brought in a County Court for the recovery of a money judgment, that the complaint should aver the jurisdictional fact that the defendant at the time of the commencement of the action is a resident of the county in which it is brought. The Constitution of 1846, ordained that the County Courts in the several counties, except New York, "shall have such jurisdiction in cases arising in Justices' Courts, and in special cases, as the legislature may prescribe, but shall have no original civil jurisdiction, except in such special cases." By the thirtieth section of the judiciary act of 1847, passed in assumed execution of this constitutional authority, jurisdiction was conferred on the County Courts, of actions of debt, assumpsit

Opinion of the Court, per ANDREWS, J.

and covenant, where the debt or damages claimed shall not exceed \$2,000, "when all of the defendants at the time of commencing the action shall reside in the county in which such court is held." The action of *Frees v. Ford* was commenced after the passage of the judiciary act, but before the enactment of the Code of 1848. The complaint in that case did not aver that the defendant resided in the county, and the defendant interposed a plea to the jurisdiction, and the plaintiff demurred to the plea, the intention of the parties being to present in this form, for the determination of the court, the question of the constitutionality of the thirtieth section of the judiciary act, the precise point being whether an act of the legislature, conferring jurisdiction on the County Courts in certain classes of common-law actions, limited only in respect of the amount claimed, and the residence of the defendant, made the actions specified, special cases, within the Constitution of 1846. The constitutionality of the act was affirmed by the County Court and at the General Term, but when the case came to this court the judges declined to pass upon the constitutional question, but, applying the rule that on demurrer judgment must go against the party who committed the first fault in pleading, reversed the judgment of the courts below on the ground that, assuming the constitutionality of the thirtieth section of the judiciary act, nevertheless, the complaint was fatally defective because it did not aver that the defendant resided in the county at the commencement of the action. The court in assigning the reasons for its judgment said, "the County Court is not a court of general jurisdiction, as was the old Court of Common Pleas; on the contrary, it is a new court with a limited statutory jurisdiction. To all such courts the rule universally applies, that their jurisdiction must appear on the record." In this way the court avoided deciding in that case the constitutional question raised, but it was afterwards decided in *Kundolf v. Thalheimer* (12 N. Y. 593).

The rule declared in *Frees v. Ford*, that the residence of the defendant in the county is a jurisdictional fact which must be averred in a complaint in an action in the

Opinion of the Court, per ANDREWS, J.

County Court, brought under the judiciary act of 1847, would seem to be equally applicable to an action brought since the constitutional amendment of 1873, and the enactment of section 340 of the Code of Civil Procedure, defining the jurisdiction of County Courts. The amendment of 1873 declares that the County Courts shall have original jurisdiction in all cases where the defendants reside in the county, in which the damage claimed shall not exceed \$1,000. This language, and that of section 340 of the Code, so far as relevant to the present inquiry, is substantially the same as the thirtieth section of the judiciary act of 1847, and if an averment of residence of the defendant in the county was essential under the act of 1847, the mere fact that the jurisdiction of County Courts is now defined by the Constitution, but in language substantially identical with the language of that act, would not seem to furnish a sufficient reason for changing the rule of pleading.

But the counsel for the plaintiff relies upon sections 481, 488 and 498 of the Code of Civil Procedure, and especially upon section 488, defining the causes of demurrer, in support of his contention that in an action in the County Court an averment in the complaint of the residence of the defendant within the jurisdiction is no longer necessary. Section 481 is the general section, applicable to both the Supreme and County Court, specifying what a complaint must contain, and there is no specification which requires any averment as to the residence of the parties. But the prescription in this section, of matters which must be averred in the complaint, is not in terms exclusive. Section 488 authorizes a defendant to demur to a complaint where one or more of eight objections specified "appear upon the face thereof," and among these objections are objections to the jurisdiction. Section 498 authorizes the objections specified in section 488 to be taken by answer where they do not appear on the face of the complaint. It is insisted that it does not appear on the face of the complaint that the defendant, at the commencement of the action, was not a resident of the county in which the action was

Opinion of the Court, per ANDREWS, J.

brought, and that this jurisdictional fact may exist, although not stated therein, and consequently that the absence of jurisdiction not being disclosed on the face of the pleading, the complaint is not demurrable under section 488, and that the case is one where the objection should be taken by answer under section 498. This argument is not without plausibility or force. But when we recur to the principle upon which the validity of judgments of courts of limited or inferior jurisdiction is determined, we think it may fairly be held that the sections of the Code referred to do not affect the rule declared in *Frees v. Ford*. In *Peacock v. Bell* (1 Saund. 73), it is said that "nothing shall be intended to be without the jurisdiction of a Superior Court but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged." This statement of the rule has been frequently approved. The rule has been applied in many cases in the Supreme Court of the United States to test the validity of judgments rendered in the Circuit Courts of the United States. The jurisdiction of those courts of suits between individuals is made, by the act of Congress of 1789, to depend upon the alienage of one of the parties, or upon the fact that the plaintiff is a citizen of the state where the suit is brought, and the defendant a citizen of another state. The Circuit Courts of the United States, although not inferior courts, are courts of limited jurisdiction. It has been uniformly held that the record of a judgment of a Circuit Court must affirmatively show the existence of the jurisdictional fact, and that, unless the contrary appears by the record, the presumption is that the case was without its jurisdiction, and it is further held that the question may be raised for the first time on error, and if on examination it is found that the record is silent as to the jurisdictional fact, the judgment will be reversed. (*Stanley v. Prest., etc.*, 4 Dallas, 8; *Robertson v. Cease*, 97 U. S. 646; *Grace v. Ins. Co.*, 109 id. 283; *Continental Ins. Co. v. Rhodes*, 119 id. 237.) It was upon

Opinion of the Court, per ANDREWS, J.

this principle that the case of *Frees v. Ford* was decided. We are not aware of any case in this state which controverts the general rule, that in a direct proceeding to review a judgment of a court of limited and inferior jurisdiction the record must show affirmatively that the court had jurisdiction, or else the judgment will be set aside. *Frees v. Ford* is an authority that the presumption that the inferior court is without jurisdiction when the jurisdictional facts are not alleged in the complaint, prevails on demurrer. What courts are to be regarded as courts of limited jurisdiction, so that their proceedings shall be affected by the presumption stated, is a question not always free from difficulty. (*People v. Bradner*, 107 N. Y. 1). But that County Courts, as now organized, are of that description, is a conclusion which seems to follow from the case of *Frees v. Ford*. Construing the complaint in this action in view of the legal presumption, it follows that, there being no allegation therein as to the residence of the defendant, there is not simply an absence of any information in the complaint, one way or the other, as to the fact, but an affirmative presumption, from its silence upon the point, that the defendant was not a resident of the county when the action was commenced, and, therefore, the fact does appear on the face of the complaint that the County Court did not acquire jurisdiction, an objection which was properly taken by demurrer. The argument, derived from the rules of pleading established by the Code, does not satisfy us that the legislature intended to abrogate the presumption to which we have adverted, nor do we think that the fact that the jurisdiction of County Courts, of common-law actions like the present one, is now prescribed in the Constitution itself, and is not dependent upon the statute, takes the case out of its operation. They are still courts of limited jurisdiction within the case of *Frees v. Ford*.

These views lead to an affirmance of the judgment.

All concur.

Judgment affirmed.

Statement of case.

MARY APPEL, as Administratrix, etc., Respondent, v. THE BUFFALO, NEW YORK AND PHILADELPHIA RAILWAY COMPANY, Appellant.

A., plaintiff's intestate, a switchman employed in defendant's yards, in helping to make up and distribute trains, while engaged in his employment caught his foot in a "frog" which connected two converging tracks and was used to effect the transfer of cars from one track to the other; before he could release himself he was run over and killed. In an action to recover damages, it was claimed that blocks of wood could be placed in the openings of frogs and thus prevent such accidents. It appeared that A. had been in defendant's employ for some years and for quite a length of time in and about the yard where the accident happened and was acquainted with the frog and knew that it was not "blocked." *Held*, that A., in accepting and continuing in the employment assumed the hazard of all known and obvious dangers, and that he was chargeable with notice of the difficulty in removing the foot when caught in the frog, and of the danger to be apprehended therefrom; and, therefore, that a cause of action was not made out and a refusal to nonsuit was error.

(Argued December 8, 1888; decided December 11, 1888.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered on an order made April 17, 1886, which denied a motion for a new trial and ordered judgment for plaintiff on verdict.

This action was brought to recover damages for alleged injuries causing the death of Henry Appel, plaintiff's intestate.

Appel was a switchman in defendant's employ and was engaged in coupling and uncoupling cars in its yards in Buffalo. His business was to direct the movement of the cars of a train for distribution in the yard and to uncouple the cars. While engaged in uncoupling cars his foot was caught in a frog and he was run over and killed. The alleged negligence was in the neglect to "block" the frog. Plaintiff's evidence tended to show that this might have been done by inserting wooden blocks between the converging rails constituting the frog. It did not appear that it was usual so to do and defendant did not do it.

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Statement of case.

John G. Milburn for appellant. A servant who has accepted service with knowledge of the character and position of structures, from which he may be liable to injury, cannot, in case of injury resulting therefrom, maintain an action against his employer for indemnity; he assumes apparent risks, and cannot call upon his employer to make alterations to secure greater safety. (*De Forest v. Jewett*, 88 N. Y. 264, 268; 23 Hun, 490; *Powers v. N. Y., L. E. & W. R. R. Co.*, 98 N. Y. 274; *Burke v. Witherbee*, Id. 562, 567; *Marsh v. Chickering*, 101 id. 396; *Sweeny v. B. & J. En. Co.*, Id. 520; *Shaw v. Sheldon*, 103 id. 667; *Hickey v. Taaffe*, 105 id. 26; *Anthony v. Leeret*, Id. 591; *Cahill v. Hilton*, 106 id. 518; *R. R. Co. v. McCormick*, 74 Ind. 440; *Williams v. R. R. Co.*, 43 Iowa, 396; *R. R. Co. v. Coats*, 62 id. 486; *Mays v. R. R. Co.*, 63 id. 562; *Tuttle v. R. R. Co.*, 122 U. S. 189; *Lovejoy v. R. R. Co.*, 125 Mass. 79; *Moulton v. Gage*, 138 id. 390; *Pingree v. Leyland*, 135 id. 398; *Yeator v. R. R. Co.*, Id. 418.) The surface and sides of the rails being equally in sight, ordinary care required the switchman to observe both the surface of the rail and the shape of its side. (*Haas v. B., N. Y. & P. R. R. Co.*, 40 Hun, 145; *Mays v. R. R. Co.*, 63 Iowa, 562; *Cahill v. Hilton*, 106 N. Y. 518; *Powers v. R. R. Co.*, 98 id. 277-280; *Marsh v. Chickering*, 101 id. 399, 400; *Hickey v. Taaffe*, 105 id. 37; *Anthony v. Leeret*, Id. 600.) The question as between master and servant is, whether the master has exercised ordinary care in providing the facilities and appliances necessary in the business. (*Wright v. R. R. Co.*, 25 N. Y. 562; *Leonard v. Collins*, 70 id. 90; *Warner v. Erie R. Co.*, 39 id. 468; *Henry v. R. R. Co.*, 81 id. 573.) The master is not bound to use the safest known appliances or instruments, nor to discard those which are not such, and to supply their places with others that are safer. (Thompson on Neg. 983; *Burke v. Witherbee*, 98 N. Y. 562; *Marsh v. Chickering*, 101 id. 396; *Sweeney v. Envelope Co.*, Id. 520; *Bajus v. R. R. Co.*, 103 id. 312; *Hickey v. Taaffe*, 105 id. 26; *Anthony v. Leeret*, Id. 591.) It was error to charge the jury that it was the duty of the defendant to furnish proper

Statement of case.

tracks and proper implements in its railroad business. (*Leonard v. Collins*, 70 N. Y. 90.) It was error to charge the jury that, in the absence of the attention of the employe being called to it, no duty rests upon him to examine and scrutinize carefully the structures and appliances used in connection with the business in which he is employed. (Thompson on Neg. 1009.) The court erred in refusing to charge the jury that if the officers of the company having charge of the tracks and frogs, after the exercise of ordinary care and investigation, exercised a fair and honest judgment in not blocking the frogs, the defendant was not chargeable with negligence. (*De Forest v. Jewett*, 19 Hun, 506.)

H. J. Swift for respondent. The duty of the master to the servants, and the implied contract between them, is to the effect that the master shall furnish proper, perfect and adequate machinery and other materials and appliances necessary for the proposed work, and that the duty or contract is to be affirmatively and positively fulfilled and performed. (*Bushby v. N. Y., L. E. & W. R. R. Co.*, 37 Hun, 104; *Hawley v. N. C. R. R. Co.*, 82 N. Y. 370; *Lanning v. N. Y. C. & H. R. R. Co.*, 49 id. 521.) This duty is not fulfilled simply by employing fit and competent agents to see that it is performed. (*Kirkpatrick v. N. Y. C. R. R. Co.*, 79 N. Y. 240.) As it appears that, while doing his work, the attention of plaintiff's intestate would not be called to the frog, as his work was above it, and his attention directed to the coupling and uncoupling of the cars, and not to the position of his feet, it cannot, therefore, be said, as a matter of law, that he was chargeable with negligence in not discovering the danger into which he fell. (*Bushby v. N. Y., L. E. & W. R. R. Co.*, 37 Hun, 106; *Meecham v. S. R. R. Co.*, 73 N. Y. 585; *Dale v. St. L., K. C. & N. R. R. Co.*, 21 Am. R. R. Rep. 217.) The question submitted to the jury whether the plaintiff's intestate knew of the particular danger resulting from the unblocked frog, and the evidence in the case raised a fair question for the consideration of the jury, which the court

Opinion of the Court, per PECKHAM, J.

was obliged so to submit. (*Wooley v. Grand St. R. R. Co.*, 83 N. Y. 121-125; *Kane v. Smith*, 89 id. 375-385; *Hawley v. N. C. R. R. Co.*, 82 id. 370-372; *Magee v. R. I. & P. R. R. Co.*, 9 Am. R. R. Rep. 527.)

PECKHAM J. The plaintiff's intestate had been a switchman for some years and had been for quite a length of time in the employment of the defendant in and about the yard where the accident happened, and he was, therefore, acquainted with the means employed therein by the defendant to accomplish its necessary work. Part of the means was the "frog" which was used to effect the transfer of a train from one track to another which crossed it. Its shape and purpose and the fact that it was unblocked must have been as familiar to the deceased as any other thing connected with the railroad.

It is scarcely to be credited that a man employed as a switchman, and who discharged his duties in the midst of a large number of just such instruments, could possibly be ignorant of their shape or of the fact that they were unblocked, or could fail to understand that there was a liability or chance to get one's foot caught in their converging rails and to suffer some grievous accident therefrom.

The court below very properly held that, by his acceptance of the service and his continuance therein, the deceased assumed the hazard incident to an obvious or known danger. But the court held, with some hesitation, that it might be submitted to the jury as a question of fact whether the deceased was charged with notice of the manner and difficulty of removing his foot when within these converging rails and of the danger of the situation in which he might then be placed.

We feel quite sure that one who worked among these rails daily for months and years, necessarily, was familiar with their shape and general construction, and must have known of the difficulty of removing a foot caught in the space between the rails and the danger of the situation arising therefrom. We cannot believe that any one could thus work and yet,

Statement of case.

while familiar with the frog, its purpose and use, and with its apparent form and condition, and that it was unblocked (with all of which knowledge the learned court below correctly charged the deceased), could still be ignorant that there was danger to be apprehended by getting his foot caught between the rails, and that there was a liability to have it thus caught. Such liability is seen upon the slightest inspection of the frog when coupled with knowledge (which, we believe, is in the possession of every man) that the rail of a railroad as it rests upon the ground is wider at the top and bottom than in the center.

We can have no doubt that the danger was obvious and known to the deceased. The case cannot be distinguished from *De Forest v. Jewett, Receiver, etc.* (88 N. Y. 264.)

The judgment should, therefore, be reversed and a new trial ordered, with costs to abide the event.

All concur.

Judgment reversed.

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113	394
118	336
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144	477

HENRIETTA C. SMITH, Appellant, v. JOHN T. CORNELL,
Executor, etc., Respondent.

In January, 1883, one S. died, seized of certain real estate which, by his will, he devised to his executor in trust for certain uses and purposes. This trust was, in an action brought by plaintiff, his only child, in November, 1883, adjudged invalid and the lands were held to descend to plaintiff as the testator's sole heir-at-law. At the time of the testator's death the taxes on these lands for several years were unpaid and in May, 1883, a sale was had for the unpaid taxes of 1879. Immediately after obtaining the decree setting aside the trust, plaintiff brought an action to compel defendant, as executor, to pay from the personal property in his hands the taxes remaining unpaid and to redeem the lands from the tax sale. The executor set up as a defense that plaintiff had purchased the lands at a sale in October, 1883, under a decree in an action brought by the widow against the executor, in his capacity as trustee, for the recovery of her dower, to which plaintiff was not a party, which sale and the conveyance thereunder were made subject to the unpaid taxes and the sale for taxes. It appeared that the testator's personal estate was sufficient to discharge the tax liens, and no claims had been presented to

Statement of case.

the executor pursuant to his notice of a character entitled to a preference over the taxes imposed and unpaid prior to the testator's death. *Held*, that the taxes were the personal debts of the testator and the executor was not released, by plaintiff's purchase in the dower action and acceptance of the deed, from the obligation imposed upon him by statute (2 R. S. 87, § 27), to pay the same.

In the absence of a covenant or agreement to that effect, contained in the instrument of conveyance, the grantee of lands does not assume a personal obligation to pay existing incumbrances

Smith v. Cornell (19 J. & S. 354) reversed.

(Argued December 3, 1888; decided December 11, 1888.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made March 2, 1885, which reversed a judgment in favor of plaintiff, entered upon a decision of a judge at Special Term. (Reported below, 19 J. & S. 354.)

The nature of the action and the facts are sufficiently stated in the opinion.

Benjamin M. Stillwell for appellant. Upon the death of the testator the taxes became a first lien upon the personal estate in the hands of the executor, and the land thereby became only secondarily liable therefor. (*Harrison v. Peck*, 56 Barb. 265; 2 R. S. 87, § 27.) The judgment in the action to recover dower was only interlocutory and determined nothing, except that the widow was entitled to dower in said lands. (Code, §§ 1619, 1624.) The purchase of said lands by the plaintiff under the judgment in the action for dower, and the acceptance by her of the referee's deed therefor, subject to the unpaid taxes and sales therefor, cannot be construed as a contract on her part to pay such taxes, nor did such purchase in any way affect any right or title which she had in or to such lands prior to the judgment and sale, and prior to the commencement of the action for dower. (Code, §§ 1619, 1624, 2798; *Belmont v. Cowan*, 22 N. Y. 438.)

Horace Secor, Jr., for respondent. The provision of the statute providing for the order of the payment of the debts of a decedent, and giving preference to debts entitled to a prefer-

Opinion of the Court, per GRAY, J.

ence under the laws of the United States, and to taxes assessed prior to the death of the decedent, is made for the benefit of the government." (*Seabury v. Brown*, 3 Bradf. 207.)

GRAY, J. At the time of the testator's death, in January, 1883, he was seized of certain real estate in New York city, and, by his will, he had devised the same to his executor, in trust for certain uses and purposes. As the result of an action brought by this plaintiff, his only child, it was, in November, 1883, adjudged and decreed that the trust, attempted to be created by the will, was an unlawful one, and that the lands descended to plaintiff, as sole heir-at-law of the testator. At the time of his death there were unpaid the taxes imposed upon the lands for several years past, and, in May, 1883, a sale was had for the taxes in arrears for the year 1879. Immediately upon obtaining her decree, this action was commenced by the plaintiff to compel the defendant, as executor of her deceased father, to pay from the personal property in his hands the taxes remaining unpaid, and to redeem the lands from the tax sale thereof. The executor defended the action and alleged that the plaintiff had purchased the lands at a sale had in October, 1883, pursuant to the terms of a decree in an action brought against him by the widow of the deceased for the recovery of her dower, and that the sale and the referee's conveyance to this plaintiff were made subject to the unpaid taxes and sale therefor mentioned. The personal estate was sufficient for the purpose of discharging the tax liens, and no claims had been presented to the executor, pursuant to his notice, of a character entitled to a preference, under the laws, over taxes imposed and unpaid prior to the testator's death.

The contention of the appellant on these facts is, that the General Term have erred in reversing the judgment of the Special Term, which adjudged that the defendant, as executor, should pay the taxes in question, and we think the appeal should be sustained.

The theory of the defense is to the effect that the purchase by this plaintiff at this sale under the decree in the dower

Opinion of the Court, per GRAY, J.

action, and the acceptance of the deed of the referee conveying subject to unpaid taxes, etc., operated to release the executor from the legal obligation resting upon him to discharge these debts of the testator. The General Term accepted that theory and thereby fell into serious error. The learned judge, who delivered the opinion of the General Term below, said that when this plaintiff bought the premises "subject to taxes, it was the equivalent of an obligation to the defendant that the land should be the primary fund for the payment of taxes and not the personal property of the estate," and that she "thus consented that the executor need not so apply the personal estate."

No such consequences did, or could possibly flow from the transaction of purchase by this plaintiff, either in equity or at law, and the defendant was never absolved from his duty as executor to apply the personal estate in his hands to the payment of these taxes. By the provisions of the Revised Statutes of this state, the obligation is imposed upon executors and administrators, next after debts entitled to a preference under the laws of the United States, to pay "taxes assessed upon the estate of the deceased previous to his death." (Part 1., chap. 6, tit. 3, art. 2, § 27.) This preference is commanded by the statute, and in obedience to the command the executor or administrator must apply the personal property of the estate as directed. The taxes unpaid at the testator's death were his personal debts (*Seabury v. Bowen*, 3 Bradf. 207; *Griswold v. Griswold*, 4 id. 216.) And we are unable to find any reason for supposing that the rights of this plaintiff, as his heir-at-law, with respect to their payment, were affected by the decree in the widow's dower action, or by the conveyance thereunder. That action was by the widow against the executor, in his capacity as trustee of the real estate under the will, and this plaintiff was no party to it and could not, in any sense, be considered bound by its result. To the contrary, her pending action to have that trust declared invalid was a distinct and emphatic assertion of a claim, as hostile to the trust title in the executor, as it was

Opinion of the Court, per GRAY, J.

irreconcilable with the supposition of any waiver on her part of her legal rights. One effect of her purchase at the sale, under the decree in the dower action, was to protect her interests in the estate. She sacrificed nothing and conceded no rights away. When, subsequently, by the decree in her action, the trust in the executor was declared unlawful, matters were reinstated in the condition in which they were before the sale in the dower action; with this sole feature, that from the heir-at-law's money the widow's dower interest had been satisfied. The decree in the widow's action was ineffectual to give a good title to anyone, as the title had never passed out of the heir-at-law; but it had served the end of admeasuring the dower-right of the widow. Even had the sale been valid in the widow's action and to a stranger, as it was subject to the lien of unpaid taxes, the value would have been *pro tanto* diminished and this plaintiff would have had her claim upon the personal estate in the executor's hands for reimbursement. How is the question affected because she herself stepped in and bought the property charged with the lien?

She was not a party to the action, and was not bound by any step or proceeding in its conduct; its force was against the executor of the will, as invested with the legal title to the lands, through the devise to him in trust; the subsequent judgment, in the pending action by this plaintiff, declared the trust illegal and left the title in this plaintiff, as heir-at-law, as of the time of testator's death; and, when she bought in the lands, she made no agreement, expressed in words importing such, or to be implied from the conveyance, assuming the payment of the existing incumbrances.

In the absence of a covenant or agreement to that effect, contained in the instrument of conveyance, the grantee of lands does not assume a personal obligation to pay existing incumbrances. (*Belmont v. Coman*, 22 N. Y. 438; *Equitable Life Ins. Co. v. Bostwick*, 100 id. 629.) The plaintiff, as the grantee in the referee's deed, conveying subject to taxes, etc., thereby entered into no obligation respecting these unpaid

Opinion of the Court, per GRAY, J.

liens. Its acceptance by her neither had that effect, nor did it operate, constructively or actually, as her consent that the executor should not apply the personal property in payment of those liens. There was no assumption clause in plaintiff's deed for the payment of any incumbrances, and, neither in equity nor at law, was that which was the debt of the testator changed into a debt of her undertaking. Thus there is a total absence in this case of the elements out of which to construct a theory of an obligation, express or implied, on plaintiff's part to pay these taxes, or of an agreement by her that the executor should be released from his legal liability in respect of their payment. There is nothing here to alter what should be the invariable rule, that the personal property of a testator is the primary fund for the payment of his debts, and that the land, or the heir or devisee of the same, in respect thereto, stand simply as sureties for their payment.

In this case the executor had no administrative rights over these lands or their proceeds. If the personal property were insufficient to pay the debts, he or any creditor had a statutory right to apply to the surrogate for a decree directing some disposition of the real property for that end, and the proceeds thereby arising would be paid into the Surrogate's Court. (Code of Civil Pro. §§ 2759, 2786.) The idea of the learned judge at General Term, with respect to the relation of the defendant as executor to the real estate, was under an evident misapprehension; he had no right of control over the same; but simply the right, common to him and to the creditors, in a certain contingency and upon a proper showing of facts, to call into exercise the power of the Surrogate's Court over the real estate of the decedent.

Nothing in the record calls for any further expression of opinion, and, for the reasons stated, the order of the General Term should be reversed, and the judgment of the Special Term should be affirmed, with costs to the appellant in both courts, to be paid out of the fund in the defendant's hands as executor.

All concur.

Judgment accordingly

Statement of case.

LOUIS SIEDENBACH, Appellant, v. JULIA A. RILEY, as
Administratrix, etc., Respondent.

An order of General Term reversing a judgment entered upon a verdict directed by the trial court and ordering a new trial, is not *res adjudicata* between the parties, and upon an appeal to this court from a General Term judgment, affirming a judgment rendered on a second trial, every question of law appearing in the record can be considered as if the General Term decision was rendered upon a first appeal.

Where the complaint in an action to recover possession of personal property contains no averment of a wrongful taking, but simply alleges a wrongful detention, a general denial puts in issue both plaintiff's title and the wrongful detention, and under it defendant may show title in a stranger although he does not connect himself with the title.

The fact that an agent in a contract for the purchase of property binds himself individually, as well as his principal, to pay the purchase-price, does not give him title, or conclusively establish title in him, where the evidence discloses that he, in fact, purchased for his principal.

In an action to recover possession of property alleged to have been wrongfully detained, plaintiff claimed under a bill of sale which the evidence showed was intended as a mortgage. The instrument was not filed as a chattel mortgage. The property was at the time in store, and was subsequently levied on by defendant's intestate by virtue of an attachment. There was sufficient evidence to justify a finding that it never went into plaintiff's possession prior to the levy under the attachment. *Held*, that as against the attaching creditor the mortgage was void under the statute (Chap. 279, Laws of 1833); that a mere constructive possession would not answer the requirements of the statute.

Also, *held*, that if the instrument was intended as a pledge, there was a similar infirmity in plaintiff's position, as a pledge could not become operative without delivery to the pledgee.

Also, *held*, that a similar infirmity attaches if the instrument was to be considered as a bill of sale, in the absence of proof that it was made in good faith and without intent to defraud, as the sale not having been accompanied by immediate delivery and followed by a continued change of possession was presumptively fraudulent as against creditors of the vendor. (2 R. S. 136, § 5.)

(Argued December 3, 1888; decided December 11, 1888.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 17, 1886, which modified, and affirmed

Statement of case.

as modified, a judgment in favor of defendant entered upon a verdict.

This was an action to recover possession of certain rifles and "spare-parts" belonging thereto.

On the 13th day of February, 1879, Roderigo Toledo held some kind of agency for the government of Honduras, and on that day he entered into a contract with one Farington, in which he is described as "R. Toledo, Esq., special commissioner of the Republic of Honduras," whereby Farington agreed to sell to the government of Honduras, six thousand rifles, with the spare parts furnished therewith, for the sum of \$6.60 each; and Toledo agreed on his own behalf and on behalf of the government of Honduras to pay for the rifles on delivery. In pursuance of that contract, Farington delivered to Toledo two thousand five hundred rifles and the spare parts belonging thereto, then stored in the United States government ordnance building at the Brooklyn navy yard, and Toledo paid therefor and left one thousand of them and the spare parts at that place. The plaintiff claims that some time prior to July, 1879, he loaned \$17,000 to Toledo, and took as security therefor a quantity of jewelry; that he held the jewelry as security for the loan until July 21, 1879, when Toledo paid \$12,000 on the loan under an agreement by which he was to receive from the plaintiff the jewelry and substitute therefor as security for the balance of the loan the one thousand rifles and the spare parts remaining at the navy yard, and that to carry out that agreement the following instrument was executed between the parties on that day: "In consideration of one dollar to me in hand paid by Louis Siedenbach, Esq., I hereby sell, assign, transfer all my right, title and interest in one thousand Remington standard rifles, calibre fifty, Springfield pattern, now deposited in the navy yard of the United States in Brooklyn, to the said Louis Siedenbach, with the conditions that I, or the parties representing me, shall have the right to purchase the same at any time within three months from date, for the sum of \$7,272.37." Toledo, immediately

Statement of case.

after the execution of that instrument, left this country, and Farington, claiming that he owed him a large sum of money for breach of contract in December, 1879, commenced an action against him, and procured an attachment which was levied by the defendant's intestate, as sheriff of Kings county, upon the one thousand rifles and spare parts, and by virtue of the attachment the sheriff took and held the property. The complaint does not allege a wrongful taking of the property by the sheriff, or that he had become wrongfully possessed thereof, but simply alleges that he wrongfully detained the property from the plaintiff, and that its value was \$7,500, and judgment is demanded that the defendant deliver the property to the plaintiff and pay him damages for the detention thereof. In his answer the defendant denies that he wrongfully detained the property described in the complaint, and avers that he had "no knowledge or information sufficient to form a belief that the said goods and chattels or any part thereof were, or are the property of the plaintiff;" and further answering, he alleges the action arising upon contract to recover \$6,000 of Toledo, the issuing of the attachment, the receipt of the same by him; that by virtue thereof he levied upon and attached the rifles, and that they at the time were the property of Toledo, or that Toledo had a leviable or attachable interest therein; and judgment is demanded for the return to him of the goods, and if return could not be had, then for the value thereof. The action was twice tried. Upon the first trial, at the close of all the evidence a verdict was directed in favor of the defendant. Upon appeal by the plaintiff to the General Term the judgment entered thereon was reversed (36 Hun 211); upon the second trial the cause was submitted to the jury, they found a verdict in favor of the defendant.

Further facts appear in the opinion.

Albert Cardozo, Jr., for appellant. The decision of the General Term on the first appeal is *res adjudicata*, not only in respect to the questions that were then expressly passed upon by the court upon that record, but also as decisive of the

Statement of case.

legal questions which might have been raised by the defendant, as necessarily incident to the judgment of reversal. (*Goslin v. Coicell*, 56 N. Y. 626; *Furness v. Ferguson*, 34 id. 484; *Wilson v. Barney*, 5 Hun, 257; *Barrington v. D. & H. C. Co.*, 13 Week. Dig. [3d Dept.] 357; *Oakley v. Aspinall*, 13 N. Y. 500; *Eaton v. Alger*, 47 id. 345; *Justice v. Lang*, 52 id. 323; *Worrall v. Munn*, 53 id. 185; *Towle v. Remsen*, 70 id. 307, 308.) Where unimpeached witnesses testify distinctly and positively to a fact, and are uncontradicted, their testimony should be credited and have the effect of overcoming a mere presumption. (*Newton v. Pope*, 1 Cow. 110; *Loomer v. Meeker*, 25 N. Y. 361; *Lesser v. Wunder*, 9 Daly, 70; *Whiton v. Snyder*, 88 N. Y. 302; *David v. Williamsburgh City F. Ins. Co.*, 83 id. 265.) The introduction by the defendant of the evidence of the plaintiff, as given on the former trial, is conclusive proof of the facts deposed to. (*Fogg v. Edwards*, 20 Hun, 90; *Elwell v. W. U. Tel. Co.*, 45 N. Y. 553.) Although the plaintiff establishes by his evidence a *prima facie* cause of action, so that when he rests his case a refusal to order a nonsuit is proper, yet if the evidence on the part of the defendant is very greatly preponderating, and especially where that preponderance arose from the facts and circumstances uncontroverted, the court would set aside a verdict for the plaintiff as against the evidence. (*Kinsman v. N. Y. Mut. Ins. Co.*, 5 Bosw. 460; *Smith v. Aetna Ins. Co.*, 49 N. Y. 211; *Sheldon v. Clews*, 17 Week. Dig. 411; *McDonald v. Walter*, 40 N. Y. 553; *Macy v. Wheeler*, 30 id. 237; *Kelly v. Frazier*, 2 Civ. Pro. 324; *Jackson v. Odell*, 9 Daly, 372; *Allis v. Leonard*, 58 N. Y. 288; *Benham v. Cary*, 11 Wend. 82; *Seibert v. Erie R. Co.*, 49 Barb. 583; *Gale v. Wells*, 12 id. 84; *Wardell v. Hughes*, 3 Wend. 416; *Johnson v. Johnson*, 15 id. 647.) Declarations of the assignor as to personal property, though made before the assignment, are not admissible against an assignee for value. (*Van Sachs v. Kretz*, 72 N. Y. 548; *Truax v. Slater*, 86 id. 620; *Clews v. Kehr*, 90 id. 633; *Dodge v. Trust Co.*, 93 U. S. 379.) Declarations by the grantor, made after the sale, have always been

Statement of case.

considered incompetent. (*Culver v. McCartney*, 40 N. Y. 220; *Tilson v. Terwilliger*, 56 id. 237; *Burnham v. Brennan*, 74 id. 597.) If the change of possession was not absolute and immediate and continued, the good faith of the transaction may still be shown to the jury, for the failure to give possession only raises a presumption of fraud, which may be rebutted by proof that the transaction was fair. (*Siedenbach v. Riley*, 36 Hun, 213.) The court has a right to send back the jury where the verdict is informal, and where it becomes manifest that a mistake is made. (*Warner v. N. Y. C. & H. R. R. R. Co.*, 52 N. Y. 427.)

Thomas E. Pearsall for respondent. The evidence in support and against plaintiff's claim left it a question of fact for the determination of the jury whether the plaintiff had established his claim to the ownership of the rifles. (36 Hun, 211; 6 N. Y. State Rep. 104.) The rifles in question were sold to the government through Toledo, its agent, and paid for by the government's money, hence the plaintiff could not recover herein. (*Griffin v. L. I. R. R. Co.*, 101 N. Y. 348; *Rooney v. Coon*, 6 Hun, 645; *Manning v. Worter*, 7 id. 482.) The title to the rifles being in the government of Honduras, Toledo, its agent, could not sell or pledge these goods of his principal for his own debt, much less for the debt of another. (*Donito v. Mosquera*, 2 Bosw. 40; *Van Amringe v. Peabody*, 1 Mason, 440; *Halloway v. Stevens*, 48 N. Y. 129; *Parsons v. Webb*, 8 Greenl. 38; *Morris v. Watson*, 15 Minn. 212; *Foss v. Robertson*, 46 Ala. 483; *Howell v. Pratt*, 5 Cush. 111; *Stevens v. Cunningham*, 3 Allen, 491; *Salters v. Everett*, 20 Wend. 275.) Had the jury decided that Toledo was the owner of the rifles, the evidence showed that the instrument under which plaintiff claimed was but a chattel mortgage, which was void as against Farington, for the reason that it was not filed and was not "accompanied by an immediate delivery and followed by an actual and continued change of possession of the thing mortgaged. (*Chapman v. Butler*, 18 Johns. 169; *Smith v. Beattie*, 31 N. Y. 542;

Statement of case.

Brown v. Bennett, 8 Johns. 96; 3 R. S. 143, §§9, 11; *Steele v. Benham*, 84 N. Y. 634; *Topping v. Lynder*, 2 Robt. 488; *Porter v. Parmly*, 52 N. Y. 185, 189; *Bullis v. Montgomery*, 50 id. 352; *Hale v. Sweet*, 40 id. 99, 101; *Ely v. Conly*, 19 id. 496; *Crandall v. Brown*, 18 Hun, 461; *Parshall v. Eggart*, 52 Barb. 373; *Yenni v. McNamee*, 45 N. Y. 614; *Bullis v. Farmly*, 52 id. 185.) Nor was the alleged delivery of one of the rifles to plaintiff sufficient under the statute. There must be immediate delivery of the whole property. (*Benedict v. Smith*, 10 Paige, 126, 128.) A symbolical delivery and constructive possession is not enough under the statute. (*Yenni v. McNamee*, 45 N. Y. 352; *Bullis v. Farmly*, 52 id. 185.) If it be claimed that the transaction between plaintiff and Toledo was a pledge, then that also was void as against the plaintiff, because there was no actual delivery or change of possession. (*Parshall v. Eggart*, 52 Barb. 374; *Collins v. Buck*, 63 Me. 459; *Wolcott v. Keith*, 22 N. H. 196; *Holmes v. Crane*, 2 Pick. 210; *Brown v. Bennett*, 8 Johns. 98; *Wood v. Dudley*, 8 Vt. 435; *Bousey v. Amos*, 8 Pick. 236; *Badlam v. Tucker*, 1 id. 389; *Brownell v. Hawkins*, 4 Barb. 491.) Had the jury determined that the instrument was a bill of sale, then they were justified in holding that it was fraudulent and void as against Mr. Farington. (3 R. S. 143, § 5.) This proof was proper and material under the denial in defendant's answer of plaintiff's claim of ownership, this being an action of *replevin in detinet*. (*Griffin v. L. I. R. R. Co.*, 101 N. Y. 348.) The court properly charged that in order for the jury to find a verdict for the plaintiff, as far as the spare parts were concerned, they must have been actually in his possession. (3 R. S. [6th ed.] 143, § 5; Id. 142, § 3.) If Toledo, at the time of executing the instrument to Siedenbach, did not own the rifles, he had no right to sell or pledge them, and if he did not own them, then plaintiff's claim was without foundation. (*Griffin v. L. I. R. R. Co.*, 101 N. Y. 348.) The instrument received by plaintiff from Toledo was, by his own showing, a chattel mortgage in the most favorable view of it. It was not filed,

Opinion of the Court, per EARL, J.

and, therefore, if it was not followed by immediate delivery and continued possession of the chattels, it was void, and plaintiff could not recover. (3 R. S. [6th ed.] 143, §§ 9, 11; *Steele v. Benham*, 84 N. Y. 634; *Crandall v. Brown*, 18 Hun, 461; *Camp v. Camp*, 2 Hill, 628; *Parshall v. Eggart*, 52 Barb. 373.)

EARL, J. The plaintiff's counsel makes the singular claim that the decision rendered by the General Term upon the first appeal, was *res adjudicata* between the parties, and was, therefore, binding and conclusive upon them in all the subsequent litigation, even in this court. That decision did not result in any judgment, and all that was decided thereby was that the verdict ought not to have been directed, and that the case should have been submitted to the jury. What was said in the opinion did not bind any one, not even the judge who wrote it. Every question of law raised in the court below appearing in the record can, therefore, be considered here as if the decision of the General Term, which is now under review, had been rendered upon a first appeal.

Under the issue in this case it was competent for the defendant to show that the plaintiff did not own the property in question. This action is in the complaint based solely upon the wrongful detention of the property claimed, and under the common-law system of practice, it would have been styled replevin in the *detinet*. In such a case a general denial puts in issue as well plaintiff's title to the property as the wrongful detention, and the defendant, under such an answer, may show title in a stranger, although he does not connect himself with such title. (*Griffin v. Long Island R. R. Co.*, 101 N. Y. 348.) It was, therefore, competent for the defendant, upon the trial of this action, to show that the property, on the 21st day of July, 1879, did not belong to Toledo, but to the government of Honduras, and that, therefore, the plaintiff did not get any title thereto by virtue of the bill of sale executed to him by Toledo on that day. We think there was evidence in the case sufficient to authorize

Opinion of the Court, per EARL, J.

the jury to find that the rifles were bought of Farington by Toledo for the government of Honduras; that they were paid for with its money, and that they actually belonged to it. The evidence that Toledo was the agent of Honduras, that the business sign upon his office described him as such, and that when he paid Farington for the rifles he declared that he did it on behalf of Honduras, and the language of the contract with Farington, and some other facts in the case, in the absence of satisfactory, much less conclusive evidence, that he purchased the rifles for himself as a private individual transaction, furnished some grounds from which it could be legitimately inferred that the rifles, after they were purchased, did not belong to Toledo. It is true that he bound himself in the contract with Farington, as well as Honduras, to pay for the rifles, but his obligation may have been, in fact, that of a mere surety. We do not deem it important to criticise the evidence in detail. It has all been considered.

Even if the rifles were purchased for and belonged to Toledo, there is evidence tending to show that the bill of sale, notwithstanding its form, was intended as a mortgage; that the plaintiff previously held as a security for his loan the jewelry, and that the rifles were substituted in the place of the jewelry as security for the balance of the loan. As against an attaching creditor, this mortgage was absolutely void, unless it, or a true copy thereof, was filed in the proper office, or unless there was an immediate delivery of the property by Toledo to the plaintiff, followed by an actual and continued change of possession. (Laws of 1833, chap. 279, § 1; *Camp v. Camp*, 2 Hill, 628; *Bullis v. Montgomery*, 50 N. Y. 352; *Yenni v. McNamee*, 45 id. 614; *Porter v. Parmly*, 52 id. 185; *Steele v. Benham*, 84 id. 634.) A mere constructive possession will not answer the requirements of the statute. This instrument was not filed as a chattel mortgage, and whether the property was actually delivered, and there was an actual and continued change in its possession prior to the attachment, were questions of fact for the jury. We do not deem it important now to call particular attention

Opinion of the Court, per EARL, J.

to the evidence. It has all been carefully read and considered, and we cannot say that, taking into account the character, position and appearance of the witnesses, and the facts and circumstances proved, the jury could not properly find that the property never actually went into the possession of the plaintiffs prior to the attachment.

But if this paper was intended as a pledge of the property, there is a similar infirmity in plaintiff's position as a pledge could not become operative without delivery to the pledgee of the possession of the property; and here the jury may have found that possession was not delivered.

A similar infirmity attaches to the plaintiff's case if the instrument executed on the 21st of July, 1879, be regarded simply as a bill of sale. Because it is provided in the statute that every sale, unless the same be accompanied by an immediate delivery and followed by an actual and continued change of the thing sold, shall be presumed to be fraudulent and void as against creditors of the vendor; and shall be conclusive evidence of fraud unless it shall be made to appear on the part of the persons claiming under the sale that the same was made in good faith and without any intent to defraud such creditors. (2 R. S. 136.) Here as we have before stated the jury were authorized to find that this sale was not accompanied by an immediate delivery and followed by an actual and continued change of possession of the property sold. And hence the presumption that it was fraudulent and void as against creditors was conclusive unless the plaintiff made it appear that the sale was made in good faith and without any intent to defraud creditors. The burden was upon him to make this appear, and we are of opinion that there was evidence from which the jury could find that the plaintiff had failed to show that the sale was in good faith and without any intent to defraud. We do not deem it important to detail the evidence; but we are satisfied that there was some evidence to be submitted to the jury upon this question of fraud. The disappearance of Toledo from the country immediately after the pretended sale leaving outstanding obligations, the con-

Statement of case.

fused and contradictory statements of the plaintiff as to his purchase, the absence of proper entries in reference thereto upon any books, the subsequent treatment of the rifles by the plaintiff, the unexplained disappearance of them after they were replevied by the plaintiff and his apparent indifference in reference thereto, and other facts and circumstances were all to be weighed and considered by the jury.

We think the judgment should be affirmed with costs.

All concur.

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
ANDREW WELDON, Appellant.

It seems that under the Penal Code (§ 550), in an indictment for receiving stolen goods, it is not necessary to allege in terms that the property was received by the accused feloniously or with criminal intent.

It seems, also, that conceding a person who receives such property with a laudable intent, is not guilty of the crime, and even if a proviso to that effect had been incorporated in the statute, it would not have been necessary to negative the exception in the indictment; it would be for the defendant to show that he came within the exception.

In such an indictment it was alleged that the defendant criminally received the property. *Held*, that this was the equivalent of feloniously, and constituted a sufficient averment of criminal intent.

Also, *held*, that if the indictment was defective in this respect the case came within the provision of the Code of Criminal Procedure (§ 285), providing that "no indictment is insufficient * * * by reason of an imperfection in matter of form which does not tend to the prejudice of the substantial rights of the defendant on the merits."

Upon a criminal trial S., a witness for the prosecution, testified to a conversation with one of defendant's witnesses who had been previously examined and had testified that he had no conversation with S. on the subject. This was objected to on the ground that defendant's witness had not been previously particularly interrogated as to the time, place, etc., and it was received under objection. Defendant thereafter recalled his witness and interrogated him particularly as to the alleged conversation, and he contradicted the version of it testified to by S. *Held*, that while the objection was well taken and would have been fatal to the conviction if defendant had rested upon his exception, he waived the objection by recalling and examining his witness.

Statement of case.

The presumption arising from the recent possession of stolen goods, when unexplained, of a criminal connection with the theft, applies as well to a person charged with unlawfully receiving them as to one charged with the original taking.

(Submitted December 3, 1888; decided December 18, 1888.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made April 17, 1888, which affirmed a judgment of the Court of Sessions of Jefferson county, entered upon a verdict convicting the defendant of the crime of receiving stolen goods, knowing them to have been stolen.

The indictment charged as follows:

"The grand jury of the county of Jefferson, by this indictment, accuse Andrew Weldon of the crime of criminally receiving stolen property knowing the same to have been stolen, committed as follows:

"The said Andrew Weldon, on the seventeenth day of August, in the year of our Lord one thousand eight hundred and eighty-seven, at the city of Watertown, in the county of Jefferson and state of New York, did receive from Daniel Hoolihan, *alias* Daniel Jones, one silver watch of the value of \$45, which watch had previously on that same day, at said Watertown, been stolen from the owner thereof, George Dawson, by said Hoolihan, *alias* Jones, and said Andrew Weldon did so receive said stolen watch, knowing the same to have been so stolen as aforesaid."

The material facts are stated in the opinion.

E. C. Emerson for appellant. When the language of a statute taken literally would lead to an absurdity or manifest injustice, it is the duty of the court to limit or restrict its operation. (*People v. Davenport*, 91 N. Y. 575, 585; *People v. Comrs. of Taxes*, 95 id. 554, 558, 559; *Smith v. People*, 47 id. 330, 337; *People v. Lambier*, 5 Denio, 9; *Donaldson v. Wood*, 22 Wend. 395, 397.) The exact and literal wording of an act may be rejected when it is plain it would not carry out the legislative intent. (*Bell v. Mayor, etc.*, 105 N. Y. 139,

Statement of case.

144; *People v. Lacombe*, 99 id. 44, 48.) A thing within the intent is as much within the statute as if within the letter, and a thing within the letter is not within the statute unless within the intent. (Bacon's Abridgment, tit. Statute, 1, 5; *Holmes v. Carley*, 31 N. Y. 289, 290; *People v. Utica Ins. Co.*, 15 Johns. 358, 381.) Such intention may be collected from the cause or necessity of enacting the statute. (*People v. Lacombe*, 99 N. Y. 44, 49; *Holmes v. Carley*, 31 id. 289, 290; *Pillow v. Bushnell*, 5 Barb. 156, 159; *People v. Utica Ins. Co.*, 15 Johns. 358, 380; *People v. Spicer*, 99 N. Y. 225, 233) Penal statutes must be construed strictly. (*Bonnell v. Griswold*, 80 N. Y. 128; *Van Valkenburg v. Torrey*, 7 Cow. 252.) If there is a reasonable doubt as to the construction, the defendant must be given the benefit of such doubt. (*Chase v. N. Y. C. R. R. Co.*, 26 N. Y. 523, 525; *Whitney v. Baker*, 63 id. 62, 67.) To make out the offense of receiving stolen property, it must appear that it was received with a felonious or unlawful intent, or for the purpose of defrauding the true owner. (1 Colby on Crim. Law [6th ed.], § 1138; 2 Russ. on Crimes, 247; *People v. Johnson*, 1 Park. 564; *Miller v. People*, 25 Hun, 473; *Chatterton v. People*, 15 Abb. Pr. 148, 149.) Wherever a legislative enactment has received judicial construction, a re-enactment of substantially the same provisions in a subsequent statute will be deemed an adoption by the legislature of such construction. (*Davis v. Davis*, 75 N. Y. 221, 225, 226; *People v. Green*, 56 id. 466, 475.) As this felonious or unlawful intent was an essential element to constitute the crime, it was necessary to aver its existence in the indictment by some apt descriptive words. (1 Bish. on Crim. Pro. [3d ed.] §§ 81, 84; 1 Barb. on Crim. Law, 320; Arch. on Crim. Plead. [4th Am. ed.] 38; *People v. Allen*, 5 Denio, 76; *Sherwin v. People*, 100 N. Y. 351.) If the defendant's guilty knowledge or intent is a substantial ingredient in the offense, it must be alleged. (*King v. Jukes*, 8 D. & E. 536; *People v. Lohman*, 2 Barb. 216, 218; 1 N. Y. 379, 382; *People v. D'Argencour*, 32 Hun, 178; 1 Bish. on Crim. Pro. [3d ed.] §§ 522, 523.) If the act is criminal in its nature, an

Opinion of the C

to the evidence. It has all been considered, and we cannot say that, in character, position and appearance of the property and circumstances proved, the jury found that the property never actually came into the hands of the plaintiffs prior to the attachment.

But if this paper was intended as a bill of sale, there is a similar infirmity in plaintiff's contention that it could not become operative without the possession of the property; and the jury found that possession was not delivered.

A similar infirmity attaches to the contention that the instrument executed on the 21st of January 1881 is simply as a bill of sale. Because it is a bill of sale that every sale, unless the same be accompanied by an actual and immediate delivery and followed by an actual change of possession of the property sold, shall be presumed to be fraudulent as against creditors of the vendor; and the presumption of fraud unless it shall be made to appear to the persons claiming under the sale that the sale was made in good faith and without any intent to defraud (2 R. S. 136.) Here as we have before stated, the jury was authorized to find that this sale was not accompanied by an immediate delivery and followed by an actual change of possession of the property sold. The presumption that it was fraudulent and void as against creditors was conclusive unless the plaintiff shows that the sale was made in good faith and without intent to defraud creditors. The burden of proof is on the plaintiff to make this appear, and we are of opinion that the evidence from which the jury could find that the sale was fraudulent failed to show that the sale was in good faith and without intent to defraud. We do not deem it important to consider the evidence; but we are satisfied that there was some evidence that should be submitted to the jury upon this question of the disappearance of Toledo from the country immediately after the pretended sale leaving outstanding obligations.

Statement of case.

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THE PEOPLE OF THE STATE OF NEW YORK.

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Statement of case.

evil intent is presumed and it need not be alleged. (1 Bish. on Crim. Pro. [3d ed.] § 524.) But if such unlawful intent is not to be inferred from the act itself, it must be alleged in the indictment. (1 Bish. on Crim. Pro. [3d ed.] § 521; *King v. Phillips*, 6 East, 464, 473, 474; 1 Chitty on Crim. Law, 233.) It has been the uniform practice to allege in indictments the existence of such intent. (3 Chitty on Crim. Law, 988; Arch. Cr. Pl. [4th Am. ed.] 256; 2 id. [8th ed.] 1422; Whart. Prec., No., 453; 2 Colby's Cr. Law, 156; *People v. Johnson*, 1 Park. 564; *Miller v. People*, 25 Hun, 473.) An indictment upon a statute must state all the facts necessary to constitute the statutory offense. (*People v. Allen*, 5 Denio, 76; *Tully v. People*, 67 N. Y. 15, 19; *Eckhart v. People*, 83 id. 462, 463; 1 Whart. Cr. Law, § 364; 2 Colby's Cr. Law, 113, 114; 1 Bish. Cr. Pro. [3d ed.] §§ 625, 626; 2 id. § 868; *People v. Wilbur*, 4 Park. 19, 21.) The indictment must be drawn according to the statute as construed by the courts. (1 Bish. Cr. Pro. [3d ed.] § 628; 2 id. § 868; *United States v. Pond*, 2 Curtis C. C. 265, 268; *The Mary Ann*, 8 Wheat. 380, 389.) While the Code has abolished the forms of criminal pleadings, the indictment must still set forth all the facts constituting the crime. (Crim. Code, §§ 275, 276, 284, subd. 6.) The indictment must name the crime which is imputed to the defendant, and must also set out the facts which show such an offense has been committed. If either of the above elements are omitted, such omission is fatal. (*People v. Dumar*, 106 N. Y. 502, 509, 510.) As the indictment failed to set forth sufficient facts to show the commission of a criminal offense, the defendant could avail himself of the objection, either upon the trial or in arrest of judgment. (Code of Crim. Pro. §§ 323, 331, 467; *Sherwin v. People*, 100 N. Y. 351, 355; *People v. Johnson*, 1 Park. 564.) Before proof of statements made by a witness can be competent to discredit or impeach his testimony, the attention of the witness must be first called to the time and place of the conversation, and he must be asked specifically whether he made the statements claimed. (*Sloan v. N. Y. C. R. R. Co.*, 45 N. Y. 125, 127; *Budlong v.*

Opinion of the Court, per RUGER, Ch. J.

Van Nostrand, 24 Barb. 25; 1 Greenl. on Ev. § 462; *Gaffney v. People*, 50 N. Y. 416, 423; *Stacey v. Graham*, 14 id. 492; *Palmer v. Haight*, 2 Barb. 210, 213; *Kimball v. Davis*, 19 Wend. 437; *Hart v. H. R. Bridge Co.*, 84 N. Y. 56, 60; *Angus v. Smith*, 1 Mood. & M. 473 [22 Eng. Com. Law, 360]; 2 Phil. on Ev. [5th Am. ed.] 803, marg. 959; *Queen's Case*, 2 Br. & Bing. 300, 313 [6 Eng. Com. Law, 155, 161]; *Sprague v. Cadwell*, 12 Barb. 516, 519.) The court erred in charging the jury that the law raised a presumption of guilt from the possession of the stolen property. (*Knickerbocker v. People*, 43 N. Y. 177; 2 Russ. on Crimes, 123; *People v. White*, 3 Crim. Rep. 367, 368; *Storer v. People*, 56 N. Y. 315.)

Frank H. Peck for respondent. The indictment is good. (Crim. Code, § 276; *People v. Peck*, 2 N. Y. Crim. Rep. 314.) The effect of section 273 of the Criminal Code is to give to pleadings a more liberal interpretation. (97 N. Y. 62; Crim. Code, § 684.) It was no error on the part of the court to permit Spellicy to testify that, after defendant's arrest, he had a conversation with defendant's brother, Thomas Weldon, the witness' attention having been directed to the place where the conversation was had, to the time when had, to the person with whom the conversation was had, and to the subject matter of the conversation. (45 N. Y. 127.) Possession of property recently stolen calls upon the possessor to account for his possession, and there was no error in the judge's charge in that respect. (2 Bishop on Crim. Pro. 152; *Knickerbocker v. People*, 43 N. Y. 179; *Lindsay v. People*, 63 id. 144.)

RUGER, Ch. J. The defendant was indicted and tried in the Court of Sessions of Jefferson county, for the crime of receiving a silver watch, knowing it to have been stolen, and was convicted of the offense. The General Term affirmed the conviction and the defendant appeals therefrom to this court.

Direct evidence was given upon the trial to establish all of the essential elements of the crime charged, and the

Opinion of the Court, per RUGER, Ch. J.

verdict of the jury must, therefore, be taken as conclusively establishing the guilt of the defendant, unless some exception taken on the trial was well taken by him.

He contends, among other things, that the indictment is defective in not alleging that the property was received by him feloniously or with criminal intent, and argues that the statute could not have been intended to include within its provisions, a person who received such property with intent to restore it to its lawful owner, or for the purpose of its preservation.

It is generally sufficient to state an offense in the language used in the statute defining the crime. As said by Judge FOLGER in *Phelps v. People* (72 N. Y. 349): "If the indictment avers the offense as the statute defines it, the averment is sufficient. For the rule is that while in framing an indictment on a statute all of the circumstances which constitute the definition of the offense in the statute itself, so as to bring the accused precisely within it must be stated, yet no other description of the thing in which the offense was committed is necessary to be stated than that contained in the statute itself." (*Eckhardt v. People*, 83 N. Y. 462.) The same rule is also laid down in the recent case of *People v. West* (106 N. Y. 293).

The section of the Penal Code defining the crime in question is quite broad, and includes within its terms all persons who receive stolen property knowing it to have been stolen. No exceptions, either as to the description of the persons committing the crime, or as to the intent with which the property is received, are made by the statute. It declares that "a person who buys or receives any stolen property, knowing the same to have been stolen, is guilty of criminally receiving such property." (Penal Code, § 550.)

Conceding that a person who receives such property, with a laudable intent, is not guilty of the commission of the crime, and a proviso to that effect has been incorporated in the act, it is not necessary for the pleader to negative the exception in the indictment. The fact might have been a defense, but it would be for the defendant to show that he

Opinion of the Court, per RUGER, Ch. J.

came within the exception. (*Fleming v. People*, 27 N. Y. 334; *People v. West*, *supra*.) The allegation in the indictment that the defendant criminally received the property in question is, as here used, the equivalent of feloniously, and constitutes a sufficient description of the intent with which the property was taken if it was necessary to allege that fact. (*People v. Willett*, 102 N. Y. 251.) Even if it were necessary to negative the possibility of an innocent reception of the property by the defendant, the statement that he criminally received it would, under the liberal rule of pleading now established, be a sufficient averment of the fact that he did so under circumstances constituting a crime. It is impossible to see how the defendant could have been prejudiced by the alleged defect, and we are of opinion that, in any view, the case comes within the provisions of section 285 of the Code of Criminal Procedure providing that "no indictment is insufficient * * * by reason of an imperfection in matter of form which does not tend to the prejudice of the substantial rights of the defendant upon the merits."

The defendant also alleges that the court erred in allowing the People's witness, Spellicy, to testify to a conversation held by him with one of the defendant's witnesses who had previously been sworn, and testified that he had had no conversation with Spellicy upon the subject referred to. The objection was that the defendant's witness had not been previously interrogated as to the time, place and subject of the alleged conversation. There is no doubt but that this objection was well taken, and if the case had rested here, and the defendant had elected to stand on his exception, we are of the opinion that it would have been fatal to the conviction. The defendant, however, did not do so, but chose to recall his witness and interrogate him particularly as to the alleged conversation. The witness then gave evidence tending to contradict the version of the conversation testified to by Spellicy. We think this constituted a waiver of the objection previously taken by the defendant. He voluntarily elected to put his witness in the position of contradicting the testimony of Spellicy, and going

Opinion of the Court, per RUGER, Ch. J.

to the jury upon the question of veracity as between the respective witnesses, and cannot, under the circumstances, complain that his witness was unfairly subjected to a contradiction which might have been obviated, if his attention had been previously called to the particular subject. The witness thus had ample opportunity to correct the evidence previously given by him, or to explain the apparent inconsistency existing between his testimony and his former statements. (*Gaffney v. People*, 50 N. Y. 423.)

It was said by Chief Judge CHURCH, in *Sloan v. New York Central Railroad Company* (45 N. Y. 125), that, "the witness sought then to be impeached, should have an opportunity of making an explanation in order that it may be seen whether there is a serious conflict, or only a misunderstanding or misapprehension; and for the purpose of eliciting the real truth, this court may vary the strict course of examination."

The jury here had before them all of the statements of both witnesses as to the alleged conversation, and could fairly estimate the weight to be attached to the testimony given by them respectively upon the subject. The whole object of the rule excluding contradictory statements made by a witness, unless he has previously been interrogated thereto, was thus attained, and we do not think the defendant was unfairly prejudiced by the course pursued at the trial. The exceptions to the requests to charge were neither of them well taken. There is no question but that the recent possession of stolen property by a person, raises a presumption of guilt which may be considered by the jury, and, in the absence of explanation by such person, authorizes it to infer a criminal connection with its acquisition. This presumption applies as well to a person charged with unlawfully receiving as to one charged with its original taking. If it raises a presumption of guilt as to the more serious crime, much more should it be evidence of the guilt implied in the lesser offense. (*Knickerbocker v. People*, 43 N. Y. 179; *Stover v. People*, 56 id. 316.) The presumption grows weaker as the time of possession recedes from the time of the original

Statement of case.

taking; but the fact itself is one for the consideration of the jury under all of the circumstances of the case.

There was no element of the crime which called for the application of any rules relating to circumstantial evidence, and the court committed no error in declining to charge thereon as requested by the defendant

The judgment should be affirmed.

All concur.

Judgment affirmed.

JOHN B. HOPKINS, Jr., Appellant, v. FRANKLIN J. LOTT, as
Administrator, etc., Respondent.

Where, upon a reference under the statute of a claim against an estate, based on a legal cause of action, the plaintiff recovers nominal damages, even if the plaintiff under the Code of Civil Procedure (§§ 1835, 1836), may not recover his costs (as to which *quære*), the defendant is not legally entitled to costs, nor is the allowance thereof to him discretionary (§ 3240). The costs in such case are regulated by the Revised Statutes (2 R. S. 89, § 87) and the section of said Code (§ 8229), giving defendant costs in actions specified in the preceding section "unless the plaintiff is entitled to costs as therein specified," does not give the right, as the preceding section does give plaintiff costs in an action against an executor and administrator (§§ 2863, 8228, subd. 4), and the fact that by other sections the right is made contingent upon a refusal to refer (§§ 1835, 1836), does not authorize the awarding of costs to the executor or administrator on a recovery by the other party although costs may not be awarded to the latter.

An order awarding costs to an administrator, where he is not entitled to them, is reviewable here. (Code, § 191, subd. 3.)

Hopkins v. Lott (42 Hun, 442) reversed.

(Submitted December 6, 1888; decided December 18, 1888.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, made December 14, 1886, which affirmed an order of Special Term awarding costs and an extra allowance to defendant in a reference under the statute of a disputed claim against the estate of Sarah A. Lott, defendant's intestate. (Reported below, 42 Hun, 442.)

The claim was for damages caused by the eviction from premises leased by plaintiff from the intestate.

The judgment gave plaintiff six cents damages.

SICKELS — VOL. LXVI. 73

Opinion of the Court, per ANDREWS, J.

Henry A. Montfort for appellant. The allowance of costs to the respondent was erroneous. (Code of Civ. Pro. §§ 1835, 1836, 2863, subd. 5, § 3228, subds. 1, 3.) This was a special proceeding. (*Roe v. Boyle*, 81 N. Y. 305.) An extra allowance can only be granted in actions. (Code of Civ. Pro. § 3253; *Rens. & S. R. R. Co. v. Davis*, 55 N. Y. 145.) The respondent was entitled to no judgment in his favor, and an extra allowance, even in actions, can only be given to the party in whose favor final judgment is rendered. (Code of Civ. Pro. §§ 3252, 3253; *Bostwick v. T. R. R. Co.*, 17 How. Pr. 456.) The court below erred in denying disbursements to the appellant. (Code of Pro. § 317; *Larkins v. Maxon*, 103 N. Y. 680.)

Joseph M. Pray for respondent. Costs are in the discretion of the court in these proceedings, and include allowance and disbursements. (2 R. S. 89, § 37; Code of Civ. Pro. §§ 3240, 3253.) No appeal lies to this court from an interlocutory judgment, nor from an order affirming such judgment, except in case of decision on demurrer. (Code of Civ. Pro. § 190, subd. 4; *Kilmer v. Bradley*, 80 N. Y. 631.)

ANDREWS, J. We think costs were erroneously awarded to the defendant. The Revised Statutes, under which the reference was had, provide that the "court may adjudge costs as in actions against executors." (2 R. S. 89, § 37.) The general rule governing the allowance of costs in actions, other than those where costs are in the discretion of the court, is prescribed in sections 3228 and 3229 of the Code of Civil Procedure. By section 3228, the plaintiff, among other cases mentioned, is entitled to costs, as of course, upon a recovery of a final judgment in his favor in an action specified in the fifth subdivision of section 2863, viz., an action against an executor or administrator. By section 3229 the defendant is entitled to costs as of course upon the rendering of a final judgment in an action specified in section 3228 "unless the plaintiff is entitled to costs as therein prescribed." If, therefore, an action had been brought in the Supreme Court to enforce the claim which was

the subject of the reference, against the administrator, with the same result, the plaintiff would have been entitled to costs under section 3228, according to the general rule therein prescribed, although the recovery was nominal, because the action could not have been brought in Justice's Court, and the limitation in that section, based on the amount of the recovery, not being applicable to such a cause of action. The defendant in the case supposed would not be entitled to costs under section 3229, because it was an action in which by section 3228, "the plaintiff is entitled to costs." But the general right of a plaintiff to costs on the recovery of a judgment in his favor in an action against an executor or administrator, given by section 3228, is qualified by sections 1835 and 1836, which prohibit an allowance of costs against an executor or administrator upon the recovery of a money judgment by the plaintiff against such executor or administrator, unless the claim against the estate was duly presented, and the payment thereof was unreasonably resisted or neglected, or the defendant refused to refer as prescribed by law, either of which conditions existing, the court may, in its discretion, adjudge costs in favor of the plaintiff.

The plaintiff was properly denied costs, because the payment of the claim was not unreasonably resisted, and it was referred by the agreement of both parties under the statute. The plaintiff's cause of action was maintained by the judgment entered on the report of the referee, but his damages for the eviction, as determined, were nominal merely, and judgment was awarded in his favor for six cents only. But the right of the defendant to costs does not follow, because they were not awarded to the plaintiff under the special provisions of sections 1835 and 1836. These sections do not authorize costs to be awarded to the executor or administrator on a recovery by the other party, although costs may not be awarded to him. By section 3229, costs are given to a defendant in the actions specified in section 3228, "unless the plaintiff is entitled to costs as therein specified," and in no other cases; and section 3228 does specify that the plaintiff is entitled to

Opinion of the Court, per ANDREWS, J.

costs on a recovery in an action against an executor or administrator. By sections 1835 and 1836, the right of the plaintiff to costs is made contingent and not absolute. But the right of the executor or administrator to costs depends wholly on the language of section 3229; and where the plaintiff recovers against the executor or administrator on a legal cause of action, costs cannot be awarded to the defendant, although under sections 1835 and 1836 they are denied to the plaintiff. (*Bains v. City of Rochester*, 85 N. Y. 523.) Nor was the allowance of costs to the defendant discretionary under section 3240 of the Code. The costs are regulated by the Revised Statutes and the Code, as in actions against executors and administrators. Section 3246 regulates the manner of awarding and collecting costs, in an action by or against an executor or administrator, where costs are adjudged in favor of the other party, but it does not bear upon the present question. The order awarding costs and disbursements, with an extra allowance to the defendant, should, therefore, be reversed. The order is appealable under subdivision 3, section 191 of the Code. The question whether the plaintiff was entitled to recover his disbursements is not presented by this record.

The orders of the Special and General Terms, awarding costs to the defendant, should be reversed, with costs of both appeals to the appellant.

All concur.

Orders reversed.

Statement of case.

In the Matter of the Application of the BOARD OF STREET
OPENING AND IMPROVEMENT OF THE CITY OF NEW YORK to
Acquire Title to Lands.

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111	581
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An order of the General Term of the Supreme Court affirming an order of Special Term confirming the report of the commissioners of estimate and assessment in proceedings to acquire title to lands for the purpose of establishing a public place in the city of New York under the act of 1884 (Chap. 451, Laws of 1884), is not reviewable here.

Such an order is not made appealable, on the ground that its effect is to overrule the objections of the landowners and their request that the proceedings be discontinued, where it does not appear by the record that any order was made upon the objections and request, either independently or embodied in the order made; only the order made and appealed from can be considered.

(Argued December 11, 1888; decided December 18, 1888.)

APPEAL by landowners from an order of the General Term of the Supreme Court in the first judicial department, made May 18, 1888, which affirmed an order of Special Term confirming the report of the commissioners of estimate and appraisal, appointed in proceedings to acquire title to lands in the city of New York, for the purpose of establishing a public place in the twenty-second ward of that city, pursuant to the provisions of chapter 451 of the Laws of 1884.

John C. Shaw for appellants. The order of the General Term, affirming the order of the Special Term confirming the report, and thereby overruling the objections of the property owners to discontinue the proceedings under the statute, is appealable to this court. (*In re Canal and Walker Streets*, 12 N. Y. 406; *King v. Mayor, etc.*, 36 id. 182; *In re Comrs. of Central Park*, 50 id. 493; *In re One Hundred and Thirty-eighth Street*, 61 How. 284; *N. Y. C. R. R. Co. v. Martin*, 11 N. Y. 276; *R. & S. R. R. Co. v. Davis*, 43 id. 137; *In re Brooklyn, etc., R. R. Co.*, 72 id. 245; *In re Mayor, etc.*, 49 id. 150; *In re City of Buffalo*, 78 id. 362; *In re Dept. of Parks*, 85 id. 450; *Embury v. Conner*, 3 Comst. 511;

Opinion of the Court, per GRAY, J.

Holden v. Putnam Fire Ins. Co., 46 N. Y. 4; *Stearns v. Phoenix Ins. Co.*, 41 id. 150, 154; *In re Ryers*, 72 id. 1; *In re Swan*, 97 id. 492; Code of Civ. Pro. § 190, subd. 3.)

D. J. Dean for respondent. No jurisdictional question is involved in the orders made below, and none is brought here by this appeal. (*In re Dept. Pub. Parks*, 85 N. Y. 459; Laws of 1813, chap. 36; Laws of 1839, chap. 209; Consolidation act, § 990.) The question of the regularity or validity of this proceeding cannot be raised by an appeal from the order of confirmation. (*In re Dept. of Pub. Parks*, 85 N. Y. 459.) No appeal lies to this court from the order of the General Term affirming the Special Term order confirming the report of the commissioners. (*In re Riverside Park*, 50 N. Y. 493; *In re Dept. Pub. Parks*, 85 id. 459; *King v. Mayor, etc.*, 36 id. 182; *Mayor, etc., v. Erben*, 38 id. 305; Laws of 1813, chap. 86, § 178; *N. Y. C. R. R. Co. v. Marvin*, 11 N. Y. 276; *People v. Quigg*, 59 N. Y. 83; *In re N. Y., W. S. & B. R. R. Co.*, 94 id. 295; *In re D. & H. Canal Co.*, 69 id. 211; *People v. Betts*, 55 id. 600.)

GRAY, J. We think the appeal should be dismissed. The authority to establish the public place, or park in question, is found in the act of the legislature contained in chapter 451 of the Laws of 1884. In its second section, the act provides that the proceedings to acquire the title to the lands described shall be taken "in the manner prescribed in and subject to all the provisions of section 955 of chapter 410 of the Laws of 1882," which is known as the consolidation act. That section of the consolidation act provides that "the proceedings to acquire title to such lands shall be had pursuant to such acts as shall then be in force relative to the opening, etc., of streets, roads, avenues and public squares and places in the city of New York, which said acts are hereby made applicable to the streets and avenues, etc., and to the proceedings authorized thereby." By force of these provisions we are remitted, in our consideration of what proceedings are authorized in such matters, to the general street opening acts. The procedure

Opinion of the Court, per GRAY, J.

thereby prescribed has been construed to preclude an appeal to this court from the order of the Supreme Court confirming the report of the commissioners. (*Matter of Department of Public Parks*, 85 N. Y. 459; *Matter of Commissioners of Central Park*, 50 id. 493.) The theory underlying this construction is that these proceedings form an independent and complete system, especially created by the legislature, and not connected with or controlled by the provisions of the Code of Civil Procedure applicable to appeals to this court.

But the appellants contend that the order is made appealable, because the effect of the General Term order was to overrule the objections of the landowners and their request that the proceedings be discontinued. They argue that the question of the discontinuance does not come before the commissioners, but that it was a distinct and independent proceeding, provided for to stop further action on their report, upon its coming into the Supreme Court.

Section 990 of the consolidation act, to which this proposition has reference, provides, when that objection is competently made, that "the court shall order the same to be discontinued." But it does not appear in the record before us that any order was ever made upon these objections and request, independently, or embodied in the order made by the court, and we could consider nothing on an appeal save the orders which have been made in the courts below and which have been appealed from. We do not think that the order of the Special Term, which simply confirms the report of the commissioners, can be construed to intend more than the plain import of its language.

The appeal should be dismissed, with costs.

All concur, except EARL, J., not voting.

Appeal dismissed.

Statement of case.

THE PEOPLE ex rel. MARVIN R. CLARK, Appellant, v. HUGH J. GRANT, Sheriff, etc., et al., Respondents.

The provision of the Code of Civil Procedure (§ 157), declaring that "a prisoner committed to jail upon process for contempt * * * must be actually confined and detained within the jail," etc., and the provision (§ 111, as amended by Laws of 1886, chap. 672, § 5), providing that "no prisoner shall be imprisoned within the prison walls of any jail" under a commitment on and fine for contempt for non-payment of alimony or counsel fees in a divorce case, for a longer period than that specified, refer to an actual imprisonment within the walls of a jail, not the technical restraint under which a person is supposed to be who is committed to the custody of his counsel and suffered to go at large.

The return of the sheriff to a writ of *habeas corpus* issued to inquire into the cause of imprisonment of one imprisoned for contempt in the non-payment of alimony and counsel fees in a divorce case did not affirmatively show that the relator had not been imprisoned for the period specified. Notice of the proceedings was given as required by said Code (§ 2038) to the plaintiff in the action. She appeared and made what was termed a return verified by her affidavit, which stated facts showing that the relator had not been actually confined for the prescribed period; to this he demurred. *Held*, that this was an admission of the facts.

It seems that under the sheriff's return the relator would not have been entitled to his discharge.

It seems, also, that if objection had been made, a further return by the sheriff, showing the facts, might have been made, or the judge might have taken oral evidence to ascertain them. (§ 2031.)

(Submitted December 11, 1888; decided December 21, 1888.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made May 11, 1888, which affirmed an order dismissing a writ of *habeas corpus* and refusing to discharge the relator from imprisonment. (Reported below, 47 Hun, 604.)

It appeared by the sheriff's return that the relator was held under several warrants of commitment and imprisoned for contempt in not paying alimony and counsel fees as ordered in an action brought by his wife against him for divorce.

The facts material to the questions discussed are stated in the opinion.

Statement of case.

Edward P. Wilder for appellant. It is the province of a writ of *habeas corpus* to determine whether the "continuance" of the imprisonment is unlawful as well as whether it was lawful in its inception. (Code, §§ 2031, 2033; *People ex rel. v. Liscomb*, 60 N. Y. 559; *People ex rel. v. Jacobs*, 66 id. 428; *In re Edymoin*, 8 How. Pr. 478.) The relator's term of imprisonment had expired on October eighth, two days before his application for the writ. (Laws of 1886, chap. 672, § 5; *People ex rel. Clark v. Grant*, 11 N. Y. State Rep. 558, 559.) This result is not affected by the fact that during some part of this period of six months, the appellant was committed to the custody of his counsel. (Code, §§ 2031, 2037.) The same statute which requires the actual confinement "within the jail" of a person committed for contempt, provides also for the very exception now under review. (Code of Civ. Pro. § 157.) There is no warrant for receiving the so-called "return of Lizzie H. Clark" or regarding its allegations at all. (Code, §§ 2021, 2026, 2031, 2038, 2039.) Each of the warrants of commitment was void upon its face, and afforded no authority to the sheriff for the detention of the relator. (Code, §§ 2031, 2281, 2284, 2285; *In re Sweeney*, 40 Hun, 41; *People ex rel. Hawley v. Bennett*, 4 Paige, 282.) As it appears upon the face of the sheriff's return and the several commitments, that the relator is suffering imprisonment for the third time for the same offense, his imprisonment is illegal. (Code, § 2050, subd. 2, 3; *People ex rel. Clark v. Grant*, 11 N. Y. State Rep. 559; *De Jonge v. Bredigan*, 23 Hun, 332; *Simmons v. Simmons*, 4 Week. Dig. 130; 6 id. 263; *People v. Jacobs*, 66 N. Y. 8; *Herman on Executions*, § 373.) Whether the right to imprison has been forfeited, is a proper subject of inquiry upon writ of *habeas corpus*. (*Sandford v. Sandford*, 44 Hun, 563; *In re Sweeney*, 40 id. 41; *People v. Riley*, 25 id. 587; *Lansing v. Lansing*, 4 Lans. 377; *Hosack v. Rogers*, 11 Paige, 603; *In re Watson v. Nelson*, 69 N. Y. 537; *O'Gara v. Kearney*, 77 id. 432.)

Opinion of the Court, per EARL, J.

Wakeman & Latting for respondent. Even if the six months' limit could be applied, the time during which the relator had enjoyed the custody of his counsel under writs of *habeas corpus* sued out by him would not count as part of that time. (Code, § 2285; Fiero on Special Pro. 372, 373.)

EARL, J. Section 157 of the Code of Civil Procedure provides that "a prisoner committed to jail, upon process, for contempt, or committed for misconduct in a case prescribed by law, must be actually confined and detained within the jail until he is discharged by due course of law, or is removed to another jail, or place of confinement, in a case prescribed by law;" and section 111 provides that, "no prisoner shall be imprisoned within the prison walls of any jail for a longer period than three months under an execution or any other mandate against the person, to enforce the recovery of a sum of money less than five hundred dollars in amount, or under a commitment upon a fine for contempt of court in the non-payment of alimony, or counsel fees in a divorce case, where the amount so to be paid is less than the sum of five hundred dollars; and where the amount in either of said cases is five hundred dollars or over, such imprisonment shall not continue for a longer period than six months." The amount of alimony and counsel fees which the relator was ordered to pay was upwards of \$500, and, therefore, this was a case where he could be confined in a jail under the warrants or mandates issued against him for a period of six months, unless sooner discharged in some way authorized by law. The claim of the relator is that at the time he obtained the writ of *habeas corpus* for his release he had been imprisoned for more than six months, within the meaning of section 111. But, upon the return of the writ it appeared that he had actually been confined within the walls of a jail for a less period than one month. It is provided in section 2037 of the Code that, pending the proceedings, and before a final order is made upon the return of the writ of *habeas corpus*, "the court, or judge before which or whom the prisoner is brought, may

Opinion of the Court, per EARL, J.

either commit him to the custody of the sheriff of the county wherein the proceedings are pending, or place him in such care or custody as his age and other circumstances require." It appears that up to within a month of the time when the writ of *habeas corpus* in this proceeding was issued, the relator had, by orders of the court, been committed to the custody of his counsel, and that he had actually been at large and not confined within the walls of a jail or prison. He was not, therefore, entitled to his discharge as a person who had been imprisoned within the walls of any jail for a period of six months. The imprisonment meant in the section is an actual imprisonment within the walls of a jail, and not the technical restraint under which a person may be supposed to be, who is committed to the custody of his counsel and permitted to go at large.

But it is claimed, on the part of the relator, that the facts as to his imprisonment did not properly appear before the judge. The return of the sheriff does not affirmatively show that the relator had been imprisoned within the walls of a jail for the period of six months, and if the hearing before the judge had been confined to the facts appearing in the return, the relator would not have been entitled to his discharge. But section 2038 required that notice of the hearing upon the return to the writ should be given to the person interested in continuing the imprisonment of the relator, and that was Lizzie H. Clark, the plaintiff in the divorce suit. She was notified and appeared before the judge, and made what is called a return to the writ, verified by her affidavit, which states the facts showing that the relator had not actually been imprisoned within the walls of a jail. There was no objection made to the consideration of that verified return by the judge, and the record shows that the relator demurred to it, thus admitting the facts stated therein to be true. If objection had been made to that return, then a further return by the sheriff might have been made showing the facts, or the judge, under section 2031, could have taken oral evidence and thus ascertained the truth. We think, therefore, that the relator

Statement of case.

must be held to have admitted the facts stated in the affidavit of Mrs. Clark, and that upon those facts he was not then entitled to be discharged.

The order should, therefore, be affirmed, with costs.

All concur.

Order affirmed.

In the Matter of the Petition of the METROPOLITAN TRANSIT COMPANY OF THE CITY OF NEW YORK to Determine the Amount of Compensation to be Paid the Mayor, etc., of said City.

The privilege given to the M. T. Co. under the act creating it (Chap. 833, Laws of 1872), "to construct and operate certain railroads in the city of New York," having been defined and limited by the act, it was bound to exercise that privilege, if at all, according to the terms in which it was conferred; it could not take part and reject the rest.

As a condition upon which the court could be asked to intervene in its favor to enable it to acquire lands and street rights, the company was obliged to show, under oath, that it is its 'intention, * * * in good faith, to construct and finish a railroad from and to the places named * * * in its articles of association." (Laws of 1850, chap. 140, § 14.)

In the petition presented by said company for the appointment of commissioners of appraisal to determine the amount to be paid to the city for the use of the streets included in the routes of said company, it was stated that it was "the intention of said company, in good faith to construct, operate and maintain a railroad on the lines mentioned in said act." The city answered, among other things, denying that it was the intention of the company to construct and operate a road as mentioned in said act of 1872. On the hearing, after the company had offered evidence on the question of intent, the city offered evidence to contradict it and to controvert the expressed intent. This was excluded, the court holding that the application was sufficient proof of the intent. *Held*, error.

It seems that, if it had not been alleged in the petition and put in issue by the answer, that the company in good faith intended to build the road, proof that it did not so intend would have been proper and would have shown "cause against the granting of the prayer of the petition." (Laws of 1850, chap. 140, § 15.)

It appeared from the petition that the board constituted by said act of 1872 to locate the lines of the three branches authorized thereby made the location, and appraisers were asked for in relation to the streets affected, and also

Statement of case.

to streets affected by the main line located by the act itself. Subsequently, by order of the court, the petitioners were permitted to have the hearing proceed upon a supplemental petition, by which it appeared that after the passage of the act of 1881 (Chap. 636, Laws of 1881), amending the act of 1872, the board then consisting of different persons from those who composed it when the first location was made, made new locations of the same routes, in many respects, both as to the main route and the branches different from the routes described in the act of 1872 and in the first location. *Held*, that, so far as the "main line" is concerned, neither board had power to name the streets through which it should pass, or change or omit any portion of the line as located by the act; that the company, if it took any part of the franchise as to it, was bound to take it as given, and as to the changed location of that line the court had no jurisdiction; also, that, as the location of the main line could not be sustained, that of the branches fell with it; that if the act of 1881 was intended to give the company rights in streets other than those named in the act of 1872, it was in contravention of the provision of the state Constitution, as amended in 1874, which prohibits any law authorizing the construction of a street railroad, except upon the consent of land-owners and the local authorities or the order of the court (art. 3, § 17); that this prohibition applies to a part of as well as to a complete railroad; but *held*, that no such intention was expressed in or could be implied from the act.

(Argued October 19, 1888; decided January 15, 1889.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made May 18, 1888, which reversed an order of Special Term appointing commissioners of appraisal to fix the compensation to be paid by the petitioner to the city of New York for the use of certain streets for its railroads and which denied the prayer of said petition.

The material facts are set forth in the opinion.

Esek Cowen, George W. Wingate and J. Alfred Davenport for appellant. The General Term erred in holding that the Special Term was wrong in excluding testimony offered for the purpose of showing that the petitioner had not sufficient financial ability to build the road. (Laws of 1850, chap. 140, § 14; Laws of 1853, chap. 53, § 1; Laws of 1867, chap. 515, § 1.) The law of 1881, in ratifying the power of the board and the right of the petitioner to build its roads on the routes

Statement of case.

finally adopted and completed by the board of engineers, was not in conflict with any provision in the Constitution of this state. (*In re N. Y. El. R. R. Co.*, 70 N. Y. 337, 338, 369, 372; *People v. B., F. & C. I. R. R. Co.*, 89 id. 86; *In re Gilbert El. R. R. Co.*, 70 id. 369; *Gilbert El. R. R. Co. v. Anderson*, 3 Abb. N. C. 459; *People ex rel. Newcomb v. McCall*, 94 N. Y. 587; *Moran v. Lydecker*, 11 Abb. N. C. 302; *People v. F. & R. R. Co.*, 12 Week. Dig. 375; 24 Hun, 529; Wood on Railway Law, 759; *Neal v. P. & C. R. R. Co.*, 2 Grant's Cas. [Penn.] 137; *In re Poughkeepsie Bridge*, 108 N. Y. 493.) The length of the branches located by the board of engineers is immaterial, if their direction was such as was authorized by the act. (*In re N. Y. El. R. R. Co.*, 70 N. Y. 328-341; *Fall River Iron Works v. O. C. & F. R. R. R. Co.*, 5 Allen [Mass.] 221; *A. & P. R. R. Co. v. St. Louis*, 66 Mo. 229.) There can be no question here of any invasion by us of private rights. (*Lahr v. Met. E. R. R. Co.*, 104 N. Y. 268; *Davis v. Mayor, etc.*, 14 id. 506; *N. Y. C. Co. v. Mayor, etc.*, 104 id. 36.) Unless in the act of incorporation is to be found some provision for the cessation of corporate existence, no cause or reason exists for finding that this company is not entitled to proceed with the work for which it was organized. (*Michles v. Rochester City Bk.*, 11 Paige, 118, 129; *Astor v. Arcade R. R. Co.*, Special Term Dec. 1886; 105 N. Y. 119; *N. Y. C. R. R. Co. v. Mayor, etc.*, 104 id. 1.) By the passage of the act of 1881 the legislature waived all causes of forfeiture by distinctly recognizing this corporation and its rights. (*In re N. Y. El. R. R. Co.*, 70 N. Y. 337; *Davis v. Gray*, 16 Wall. 203; *Crocker v. Crane*, 21 Wend. 211; *B. W. & N. R. R. Co. Case*, 75 N. Y. 335; *In re Kings Co. El. R. R. Co.*, 105 id. 120.) The company could proceed to acquire both the right of way and to construct in a single proceeding, or it could divide them. But they were both proceedings to acquire the right of way. (*In re Met. T. Co.*, 45 Hun, 164, 165.) The rapid transit act has no application. The "exclusive power" given by that act to the board of commissioners to designate routes was to designate the routes

Statement of case.

which they considered that the corporation they were about to form should operate. (Laws of 1881, chap. 485; *Van Denburgh v. Village of Greenbush*, 68 N. Y. 1, 4.) The demand upon the city through the comptroller is sufficient if any demand was, in fact, essential before instituting proceedings. (*In re S. R. T. Co.*, 16 Abb. N. C. 158; *Bunge v. Koope*, 48 N. Y. 228.) The supplementary act of 1881 was a distinct recognition and ratification of the existence and organization of the corporation of the Metropolitan Transit Company. (*In re N. Y., L. & W. R. R. Co.*, 99 N. Y. 18.) The power given by the act incorporating petitioner to construct and operate an elevated railroad in New York city removes the matter from the exercise of any discretion by the court. (*N. Y. C. Co. v. Mayor, etc.*, 104 N. Y. 1; *In re P. P. & C. I. R. R. Co.*, 67 id. 371-376.) It is immaterial whether the board of engineers located a portion of any route in parts of streets not authorized by law, or in streets occupied by the Manhattan Elevated. (*In re Kings Co.*, 105 N. Y. 98; *People v. N. Y. R. R. Co.*, 45 Barb. 573; *Waterbury v. D. D. Co.*, Id. 388.)

George Hoadley and Albert Reynaud for appellant. A corporation does not lose its life by any wrong-doing, or non-doing, until judicially deprived of it by proceedings therefor. (*Day v. O. R. R. Co.*, 107 N. Y. 129; *In re N. Y. El. R. R. Co.*, 70 id. 337-338; *In re Kings Co. El. R. R. Co.*, 105 id. 119; *Denike v. N. Y. Cement Co.*, 80 id. 599; *In re Steam Transit Co.*, 78 id. 529; *People v. Walker*, 17 id. 502; *People v. Manhattan*, 9 Wend. 380; *Bk. of Niagara v. Johnson*, 8 id. 654; *B. & A. R. R. Co. v. Carey*, 26 id. 75; *In re B. W. & N. R. R. Co.*, 72 id. 245; *B. S. T. Co. v. City of Brooklyn*, 78 id. 524; *L. G. R. R. Co. v. Rainey*, 7 Cold. [Tenn.] 432; *State v. F. N. H. T. Co.* 15 N. H. 165; *Bk. of Gallipolis v. Trimble*, 6 B. Mon. [Ky.] 601; *Grand Gulf Bk. v. Archer*, 8 S. & M. [Miss.] 151; *Pearce v. Olney*, 20 Conn. 557; *Receivers v. Renick*, 15 Ohio, 322; *Boston Glass Co. v. Langdon*, 24 Pick. 52; *Comm. v. U. F.*

Statement of case.

Ins. Co., 5 Mass. 230; *Baker v. Backus*, 32 Ill. 79; *Atchafalaya Bk. v. Dawson*, 13 La. 497; *Cahill v. Kalamazoo Ins. Co.*, 2 Day [Mich.] 124; *N. J. S. R. R. Co. v. L. B. Co.*, 39 N. J. L. 35; *Day v. Stetson*, 8 Me. 372; *C. C. Co. v. R. R. Co.*, 4 Gill. & J. 1; *Bk. of Missouri v. Merchants' Bk.*, 10 Mo. 123; *Gilman v. Greenpoint Sugar Co.*, 4 Lans. 482; *Trustees Vermont Soc. v. Hills*, 6 Cow. 23; *Kishacoquillas v. McConaby*, 16 S. & R. [Pa.] 140; *Mackall v. C. C. Co.*, 94 U. S. 308; *Robinson v. London Hospital*, 21 Eng. L. & E. 371; *V. R. R. Co. v. V. R. R. Co.*, 34 Vt. 32; *C. R. R. Co. v. Bailey*, 24 id. 465; *State v. Fagin*, 22 La. Ann. 545; *Crumph v. U. S. Co.*, 7 Gratt. 352; *Chester Glass Co. v. Dewey*, 16 Mass. 102; *Whipple v. Christian*, 80 N. Y. 526; *In re Curser*, 89 id. 401; *In re D. & H. C. Co.*, 69 id. 209; *Vandenburg v. Village of Greenbush*, 66 id. 1; *People v. Palmer*, 52 id. 83; *In re Central Park*, 50 id. 493; *Village of Gloversville v. Howell*, 70 id. 287; *People v. Quigg*, 59 id. 83; *In re Evergreens*, 47 id. 216; *Baird v. Mayor, etc.*, 95 N. Y. 567; *Ex. Pet. Co. v. Lacey*, 63 id. 426; *Dewey v. Central Mfg. Co.*, 42 Mich. 399; *Isham v. Bennington Co.*, 19 Vt. 230; *Nichols v. Bertram*, 3 Pick. 342; *Felt v. Felt*, 19 Wis. 193; *State v. Goetz*, 32 id. 363.) The recognition and reaffirmation of the company's rights in the act of 1881 was a waiver of any cause of forfeiture. (*In re N. Y. El. R. R. Co.*, 70 N. Y. 338; *People v. Manhattan Co.*, 9 Wend. 398; *People v. F. P. R.*, 27 Barb. 460; *C. C. R. R. Co. v. Twenty-third St. R. R. Co.*, 54 How. Pr. 186; *People v. Phoenix Bk.*, 24 Wend. 431; *State v. F. N. H. T. Co.*, 15 N. H. 162; *Atty.-Gen. v. P. R. R. Co.*, 16 id. 470; *C. C. Co. v. B. R. R. Co.*, 4 G. & J. 127; *Atchafalaya Bk. v. Dawson*, 13 La. 497; *Lumpkin v. Jones*, 1 Ga. 30; *Commonwealth v. U. Ins. Co.*, 5 Mass. 30; *L. G. R. Co. v. Rainey*, 7 Cold. [Tenn.] 420; *State v. N. O. Gas Co.*, 2 Rob. 529; *People v. Oakland Bk.*, 1 Doug. [Mich.] 282; *Atty.-Gen. v. D. R. R. Co.*, 27 N. J. Eq. 1; *Atty.-Gen. v. Eastlake*, 11 Hare, 228; *Atty.-Gen. v. Christ's Hospital*, 3 M.

Statement of case.

& K. 344; *Atty.-Gen. v. Beverly*, 6 De G. & M. 268; *Strong v. Stebbins*, 5 Cow. 210; *Myers v. Foster*, 6 id. 569; *Harris v. White*, 81 N. Y. 544; *In re Kings Co. El. R. R. Co.*, 105 id. 99; *Standen v. Univ. of Oxford*, W. Jones. 17; *McFarland v. State Bank*, 4 Ark. 410; *Felt v. Felt*, 19 Wis. 193; Bishop on Written Laws, 126; *Harokins v. Mayor, etc.*, 64 N. Y. 18; *In re Curser*, 89 id. 401; *State v. Bacon Co.*, 41 Mo. 453; Bishop on Written Laws, 152-156; *Thames v. Hall*, 3 C. P. 415; *Gregory's Case*, 6 Co. 19; *Ex parte Smith*, 40 Cal. 914; *Rounds v. Waymart*, 31 Smith [Penn.] 395; *Brown v. Comrs.*, 9 Harris [Penn.] 37; *Covington v. E. St. Louis*, 75 Ill. 548; *M. R. R. Co. v. State*, 20 Ala. 573; *Beriden v. Barbin*, 13 La. Ann. 498; *Ellis v. Batts*, 26 Tex. 703; *Luke v. State*, 5 Fla. 185; 44 Conn. 105.) The act of 1881 was constitutional. (*In re N. Y. E. R. R. Co.*, 70 N. Y. 338; *In re Gilbert El. R. R. Co.*, Id. 369; *People v. B. F., etc., R. R. Co.*, 89 id. 86; *Gilbert El. R. R. Co. v. Anderson*, 3 Abb. N. C. 455; *In re Kings County El. R. R. Co.*, 105 N. Y. 99.) If the board's first act should be deemed incomplete and ineffectual, the legislature had a clear right to direct its completion. (*Palmer v. Yates*, 3 Sandf. 151; *Delafield v. Ill.*, 26 Wend. 26; *McLean v. Drew*, 4 Bing. 722; *Williams v. Town of Duanesburg*, 66 N. Y. 137; *People v. Mitchell*, 35 id. 551; *Town of Duanesburg v. Jenkins*, 57 id. 177; *Rogers v. Stevens*, 86 id. 625.) The function of the board was purely administrative, and a grant of fresh power was simply one of administration; and if the administration authorized was purely of a right previously existing, it was clearly no grant whatsoever of a new and original right to lay tracks. (*In re N. Y. El. R. R. Co.*, 70 N. Y. 338, 343; *Gilbert El. R. R. Co. v. Anderson*, 3 Abb. N. C. 454.) Every presumption is in favor of the constitutionality of an act of the legislature. Every intendment is in favor of its validity, and every doubt must be solved to sustain it. To doubt is to affirm it. (*In re Gilbert El. R. R. Co.*, 70 N. Y.

Statement of case.

367; *People v. Briggs*, 50 id. 553; *People v. Supervisors*, 17 id. 235; *Weismer v. Village of Douglas*, 64 id. 91; *People v. Kelly*, 76 id. 489; *People v. Comstock*, 78 id. 361; *Kerri-gan v. Force*, 68 id. 385.) The board's action in laying out the routes was competent and within its powers. (*McCluskey v. Cromwell*, 11 N. Y. 601; *People v. Suprs. of Greene Co.*, 13 Abb. N. C. 421.)

Elihu Root and *Thomas P. Wickes* for respondent. When an order is such that it may be denied by the lower court solely in the exercise of its discretion, this court will not review its determination, unless it appears in the order itself that the decision in the court below was, in fact, not based upon the exercise of that discretion. (*Clarke v. Lourie*, 82 N. Y. 508; *Brooks v. M. N. C. & Co.*, 93 id. 647; *Fisher v. Gould*, 81 id. 228; *Nat. Park Bk. v. Whitmore*, 104 id. 297; *F. L. & T. Co. v. B. & M. Tel. Co.*, 109 id. 344; *In re Kings Co. El. R. R. Co.*, 105 id. 106; *N. Y. Cable Co. v. Mayor, etc.*, 104 id. 13.) When a charter is given to a corporation to lay its tracks over a certain route, an attempt to lay its tracks over any other route is unauthorized and void. (*People v. H. R. R. Co.*, 2 Abb. Pr. [N. S.] 249; *Negus v. City of Brooklyn*, 10 Abb. N. C. 180; *People v. N. Y. C. & H. R. R. Co.*, 26 How. Pr. 44; *C. D. & V. R. R. Co. v. City of Chicago*, 9 W. Rep. 493; *Comm. v. E. R. R. Co.*, 27 Penn. St. 339; 67 Am. Dec. 471; *Dist. of Col. v. B. & P. R. R. Co.*, 114 U. S. 453; *Mayor, etc., v. Broadway R. R. Co.*, 97 N. Y. 281; *D. & H. C. Co. v. N. Y. E. R. R. Co.*, 9 Paige, 323; *Mason v. B. C. & N. R. R. Co.*, 35 Barb. 373, 381.) The petitioner's right to exercise its corporate powers has wholly ceased by reason of non-use and delay. (*In re B. W. & N. R. R. Co.*, 72 N. Y. 245; *In re Kings Co. El. R. R. Co.*, 105 id. 97.) The Metropolitan Transit Company has no power to make the present application, nor has this court the power to grant the same, for the reason that chapter 636 of the Laws of 1881 is violative of section 18 of article 3 of the Constitution of the state of New

Statement of case.

York. (*In re B. W. & N. R. R. Co.*, 75 N. Y. 335; *Farnham v. Benedict*, 107 id. 177; *In re N. Y. D. R. Co.*, 42 Hun, 621; 11 St. Rep. 753.) Chapter 636 of the Laws of 1881, under which the petitioner claims in part to be organized, and under which it claims to have duly taken certain proceedings in pursuance of the power and authority alleged to have been conferred upon it by said act, is violative of section 16 of article 3 of the Constitution of the state of New York. (*People ex rel. McConville v. Hills*, 35 N. Y. 499; *Gaskin v. Meek*, 42 id. 186; *People v. Suprs. of Chautauqua*, 43 id. 10; *Huber v. People*, 49 id. 132; *In re Assessments, etc.*, 60 id. 398; *City of Watertown v. Fairbanks*, 65 id. 588; *In re El. R. R. Co.*, 70 id. 327; *In re Sackett St.*, 74 id. 95; *In re Blodgett*, 89 id. 392; *In re Paul*, 94 id. 497; *Tingue v. Vil. of Port Chester*, 101 id. 294.) The act of 1881 could not, under the constitutional amendments of 1875, confer upon the engineers any new power to locate a railroad in a street. (*B. W. & N. Case*, 75 N. Y. 335; *Farnham v. Benedict*, 107 id. 159.) The Transit Company had not, under the act of 1872 or under the statutes of the state, power to take the streets under the general laws of the state. (*Lahr v. Met. El. R. R. Co.*, 104 N. Y. 268; *Mills on Eminent Domain* [2d ed., 1888] § 46; *In re Buffalo*, 68 N. Y. 167-171; *P. P. & C. I. R. R. Co. v. Williamson*, 91 id. 552-561; *Ex parte Manhattan Co.*, 22 Wend. 633; *Mayor, etc., v. B., etc., R. R. Co.*, 97 N. Y. 275; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659-666; *Charles River Bridge Case*, 11 Pet. 496, 504, 505.) Because the Transit Company does not intend in good faith to build its main line, it has no right to use the streets of the city for its so-called branches. (*People v. A. & V. R. R. Co.*, 24 N. Y. 261, 267; *Laws of 1850*, chap. 140, § 14; *Cable Co. v. Mayor, etc.*, 104 N. Y. 1; *Goelet v. Met. Transit Co.*, 48 Hun, 520; *Works v. J. R. R. Co.*, 5 McLean, 425, 431.) The board of engineers created by section 4 of the act of 1872, had no power delegated to them to appropriate any streets of the city of New York for the branches which they were authorized to locate. (*Laws of 1850*, chap. 224; *Laws of 1872*, chap. 834: 2 id.

Statement of case.

chap. 885.) The engineers, in locating the alleged branch on Broadway, exceeded the powers conferred upon them by the act of 1872, even though it be assumed that they had authority to appropriate streets. (Laws of 1873, chap. 837; Laws of 1875, chap. 606; Laws of 1880, chap. 417; Laws of 1881, chap. 485; Laws of 1882, chap. 410, § 1946.) Power conferred upon a subordinate body like this board of engineers, when once exercised, is used up and cannot again be exercised. (*Jermaine v. Waggener*, 1 Hill, 279, 284; *Woolsey v. Tompkins*, 23 Wend. 324; *Clark v. Norton*, 58 Barb. 434, 436; *People v. Supervisors of Schenectady*, 35 id. 408; *In re Mt. Morris Square*, 2 Hill, 14; *People v. Lynde*, 8 Cow. 133; *People v. Justices of the Marine Court*, 12 Wend. 220; *In re Third St.*, 6 Cow. 571; *U. S. v. Leng*, 18 Fed. Rep. 14, 25; *Negus v. Brooklyn*, 10 Abb. N. C. 185; *Oakley v. Trustees of Williamsburgh*, 6 Pai. 262.) The whole West street, Tenth avenue and Boulevard branch location is void, because the legislature has expressly prohibited the building of any steam railroad upon the Boulevard. (Laws of 1882, chap. 410, § 1945.) The power, if any, of the board of engineers to locate a branch along Broadway was cut off by the amendment to the Constitution that went into effect January 1, 1875. (*Negus v. Brooklyn*, 10 Abb. N. C. 185, 186.) The power, if any, of the board of engineers to locate a branch on Broadway was repealed by the Rapid Transit Act, chapter 606, Laws of 1875, passed June 18, 1875. (*Farnsworth v. M. & P. R. R. Co.*, 92 U. S. 49, 66; *Henderson v. C., etc., R. R. Co.*, 20 Am. & Eng. R. R. Cas. 542.) All the Transit Company's rights and franchises have been forfeited by operation of law. (Laws of 1846, chap. 155; *B. W. & N. R. R. Co. Case*, 72 N. Y. 246; 75 id. 336; *B. S. T. Co. v. City of Brooklyn*, 78 id. 524; *B. W. & N. Co. Case*, 72 id. 250; *Kerr v. Dougherty*, 79 id. 327, 336.) Chapter 833 of the Laws of 1872 is unconstitutional and void, because, so far as it applies to the taking of streets for a railroad, it authorizes the taking of the property of abutting

Opinion of the Court, per DANFORTH, J.

owners without compensation. (*Lahr v. M. E. R. R. Co.*, 104 N. Y. 268-292; *Cooley on Con. Lim.* 179; *Warren v. Mayor, etc.*, 2 Gray, 84; *C. B., etc., R. R. Co. v. Atchison R. R. Co.*, 28 Kan. 453; *In re N. Y. Dis. R. Co.*, 42 Hun, 621; 107 N. Y. 42; *Mesmier v. State*, 11 Ind. 482.)

DANFORTH, J. By chapter 833 of the Laws of 1872, the legislature created a body corporate under the title of "The Metropolitan Transit Company." Its capital stock was fixed at \$5,000,000, with liberty to the stockholders to increase it, but accompanied by a provision that "work on the road authorized by the act, should not be commenced until ten per cent of the capital stock shall have been paid in, in cash." The corporation so created was endowed with all the powers and privileges, and made subject to all the provisions of the act of 1850 (Chap. 140), relating to railroads, so far as the same were consistent with the provisions of the act first mentioned (Laws of 1872, chap. 833), and authorized to construct a railroad on the line described in the act, and beneath and over certain specified streets in the city of New York. The act indicates the streets and routes, forming a main line and branches, and the use and occupancy of the streets are limited by its provisions. (§§ 3, 4.) The route or line described was to begin at Broadway, opposite Bowling Green, and terminate, after passing through the enumerated streets, at the "Harlem River," and three branches, the first from a point south of Forty-second street on and to connect with the line described in the act above referred to "Easterly and northerly to the Grand Central Depot at Forty-second street and Fourth avenue." The act also provided, that "the exact location of the lines of the three branches heretofore authorized shall be such as is deemed most practicable and best calculated to promote the public interests, by a board to be composed of the state engineer and surveyor, the chief engineer of the Croton aqueduct and an engineer to be appointed by the corporation hereby created. The necessary surveys and maps for determining the lines of said branches shall be made under the direction of the said board of engineers, at the expense of the corporation hereby created."

Opinion of the Court, per DANFORTH, J.

The line prescribed in some instances passed through private property, and the act declared that the road should be constructed upon property "to be purchased or acquired," and that the corporation might purchase and occupy a space not more than fifty feet in width upon the lines indicated, and might also make the necessary connections, stations, etc., and acquire land necessary for those purposes; and if unable to do so by purchase, through inability to agree with the owners, it might obtain title "in the manner and by the proceedings prescribed for acquiring the title to real estate for railroad purposes, in and by the general railroad law of this state (Laws of 1850, *supra*), and the acts amendatory thereof, all the provisions of which, relating to acquiring the title to real estate, "were by the act extended so as to apply to any property, rights, franchises or interests required in the construction of said railroads, except that in the petition to the Supreme Court, in said proceedings, it shall only be necessary to describe the real estate, property, rights, franchises or interests which said corporation seeks to acquire; to aver that the same are required for the construction or operation of the railroads authorized by this act, describing particularly the proposed route of said roads, and to allege that said corporation has not been able to acquire title to said property, rights, franchises or interests, and the reason of such inability." * * * It further provides "that it shall not be necessary that the petition to the court shall make any allegation of or reference to any corporations, capital stock, surveys, maps, or the filing of any certificate of location." It also provides that, "where the route or routes of the railroads herein authorized to be constructed and operated shall be along any street, avenue or public place, the said corporation shall compensate the corporation of the city of New York for such use or occupancy of said streets, avenues or public places; the amount of such compensation to be determined in the same manner as damages to private property." The corporation so formed was given (§ 12) six months from the time of "the first election of directors within which to commence the construction of the said railways, and one year thereafter

Opinion of the Court, per DANFORTH, J.

within which to complete at least one of said railways to the Harlem river, and one branch road to the Grand Central depot at Forty-second street and Fourth avenue."

On the 28th of December, 1875, the company so formed presented a petition to the Supreme Court, stating, among other things, "that it is the intention of said company, in good faith, to construct, operate and maintain a railroad on the lines mentioned in the said act, and the necessary sidings, switches, depots and workshops, and to convey passengers, freight, and property in cars propelled by steam power, as mentioned in said act;" that it desires to ascertain the amount which, under its charter, must be paid to the city in relation to the construction of its road in such portions of the streets as are required for the described routes, referring to the act of 1872, and stating that they have been unable to agree with the city authorities as to the required amount, and they ask for the appointment of commissioners of appraisal to ascertain the same. The hearing on this petition was adjourned from time to time at the petitioner's request, to March 5, 1886, and then, upon condition that no further postponement should be asked for, it was, by consent of the corporation counsel, and at request of petitioner, adjourned to March 8, 1886. On the 23d of April, 1887, the petitioner was, by the order of the Special Term, permitted to have the hearing go on upon a supplemental petition, which brought before the court an act of the legislature, passed in 1881 (Chap. 636), amending the act (*supra*) of 1872, and which also stated a location of routes by the board of engineers, differing from those first determined upon. The act of 1881 authorized the filing of maps, extended the time within which to complete surveys, and declared that the "time required in section 12 of said act for the commencement of the construction of said roads shall be deemed not to have commenced until the making and filing of said maps, which shall be done within twelve months after the passage of the act."

The supplemental petition reiterated the prayer for the appointment of commissioners of appraisal, and the city

Opinion of the Court, per DANFORTH, J.

answered, putting in issue many of the allegations of the petitioner and denying, among other things, that it is the intention of the company to construct and operate a road as mentioned in the act of 1872, alleging that "the petitioner does not control sufficient pecuniary means to successfully perform the work proposed; that neither the petitioner's capital or credit is sufficient to enable it to commence, carry on or complete the construction of its proposed railroads, or to properly compensate the public and private interests which will inevitably suffer in the building and operation of its proposed railroads," and alleged that the company did not begin the construction of the road as required by section 12 of the act of 1872, or spend ten per cent of its capital thereon, or finish its road, or put it in operation within the times limited by chapter 775 of the Laws of 1867, or of section 47 of the General Railroad Act, passed April 2, 1850, as amended by chapter 775 of the Laws of 1867; that its right to exercise its corporate powers under the said acts had wholly ceased by reason of non-user and delay; that in no event is there any right in the company, under said acts, or otherwise, to acquire any right of way, or any lands in said city, or to build any such railroad as it proposes along the following named streets, to wit.: Broadway, in the city of New York, and the streets known as the Boulevards in the city of New York; that the act of 1881 (Chap. 636) is void as violating section 16 of article 3 of the Constitution of the state; that neither in the title of said act of 1881 nor in the body of the said act was any power or authority given to locate any new route or routes for the lines of the petitioner's proposed railroad; that acting in pursuance of authority alleged to have been conferred by the said act, the board of engineers mentioned in the said act located and adopted new routes.

Upon the hearing of the petition it appeared that the first election of directors was held on the 3d of July, 1874, and the secretary of state issued a certificate of the organization of the company. Among other things, the city, upon the objections raised by its answer, offered evidence to show the

Opinion of the Court, per DANFORTH, J.

inability of the company to build the road, and other circumstances to controvert its expressed intention to do so. The judge held that the application was sufficient evidence of that intent, and excluded the evidence.

We agree with the General Term in the conclusion that, in so ruling, the learned judge at Special Term erred. Good faith on the part of the company, so far, at least, as intention to build and complete its road is concerned, is made essential by the act of 1850 (Chap. 140, § 14), and there is no reason to suppose that the legislature, in giving life to this company, with power qualified in some degree, at least, by the provisions of that act, so far as they relate to the acquisition of land, or rights against the will of the owner, intended to dispense with this important condition. It was a fact stated, and being stated, was subject to denial and might be disproved. If it had not been stated, and it had appeared in evidence that such intention did not exist, that the company did not intend to construct and finish the described road, the party affected by its proceedings would have "shown cause against granting the prayer of the petition," and any further action would have been idle. (Act of 1850, § 15, *supra*.) Moreover, the petitioner gave evidence to sustain the alleged intention, and that offered by the city was competent in answer to it. This difficulty might be got along with upon another application or rehearing. There are others of a fatal and conclusive character. One of these is found at the starting point of the proceedings in question. The privilege given to the Metropolitan Transit Company was defined and limited by the act (Laws of 1872), and it was bound to exercise the privilege, if at all, according to the terms in which it was conferred. It could not take part and reject the rest. As a condition upon which the court could be asked to intervene in its favor, the company must show, under the solemnity of an oath, that it is its "intention, in good faith, to construct and finish a railroad from and to the places named for that purpose in its articles of association." (Laws of 1850, *supra*.)

Opinion of the Court, per DANFORTH, J.

The statute describes the streets through which the line may pass, authorizes branches connecting with it, but, as above stated, leaves their exact location to be fixed by a board of engineers. It appears from the petition that the board acted in March, 1875, locating the lines of the three branches, and the first petition above referred to was presented to the court, and appraisers asked for in relation to the streets affected by those lines. It also embraced the main line, as described in the act. Subsequently, July 11, 1882, the board, but consisting of different persons, made new locations of the same routes, in many respects materially different from the routes described in the statute, and materially different from those described in the first location, both of the main line and branches, by the board organized under the act of 1872. The supplemental petition embraces these last locations.

First. So far as the main line, or "the line," as it is called in the statute, is concerned, neither board had jurisdiction to name the streets through which it should pass. It is defined by the statute, and the statute itself declares that the corporation shall "have no right to acquire the use or occupancy of any of the streets or public places of the city of New York, under the provisions of said acts, or by any agreement or grant of the city authorities, except such use or occupancy as is granted or provided for in this act, and except such temporary rights and privileges, during the period of constructing said railways authorized in this act, as the proper authorities may grant to said corporation to facilitate such construction."

No discretionary power is vested in the board as to this line, and the company, if it took any part of the franchise as to the main line, were bound to take it as given. It could not operate over one street and avoid another, nor could it substitute a street not named. As to that line, so described, the court had no jurisdiction.

Second. The learned counsel for the appellant contends, however, that if the location of the main line cannot be sustained as within the authority of the act of 1872, the branches need not

Opinion of the Court, per DANFORTH, J.

also fail. The rule I have referred to forbids this conclusion. A charter must be accepted or rejected *in toto*. If accepted, it must be taken as offered by the legislature. The one under which the claim is made contains no permission, and confers no power to accept in part and reject in part. (*People v. Albany & Vt. R. R. Co.*, 24 N. Y. 261.)

It follows that the branch line locations are ineffectual. The statute has in view a main line and branches, the whole accommodating the public over a large territory. A branch or two of these disconnected from the trunk might be of value to the owner, but such a gift was not described in the statute, and there is no reason to suppose it was intended. The appellant relies largely upon the act of 1881 (Chap. 636), as curing many of the difficulties suggested by the other side. If that act was intended to give the company rights in streets other than those named in the act of 1872, it could not stand against the Constitution, which prohibits any law authorizing the construction of a street railroad, except upon the consent of owners of property and the local authorities or the order of the court. (Const. amend'nt. 1874.) This excludes a part of as well as a complete railroad. But we find no such intention expressed in the statute, nor words from which an implication to that effect can be drawn.

Other questions have been presented by counsel for the appellant as against the objections of the respondent and argued with great ability and force. We do not think it necessary to discuss them, for in our opinion they would require no different conclusion from that which must follow the views above expressed.

We think the order of the court below was right and should be affirmed.

All concur, except GRAY, J., not sitting.

Order affirmed.

Statement of case.

MARY T. CONSTANT et al., Executors, etc., Respondents, v.
THE UNIVERSITY OF ROCHESTER, Impleaded, etc., Appellant.

A principal is only chargeable with notice communicated to or knowledge acquired by his agent in another transaction at another time and when he was acting for another principal, when clear proof is made that the knowledge or notice was present in the mind of the agent at the time of the transaction in question.

The simple fact, therefore, that an attorney who has taken a mortgage for his client and placed it on record, had previously taken for another client a mortgage on the premises which was not recorded, does not charge the junior mortgagee with knowledge of the existence of the prior mortgage; it must be made to appear clearly that the attorney at the time of the execution and delivery of the second mortgage had in mind the existence of the prior one, and not only this, but also that he knew it was still an existing and valid lien. If he did recollect that the prior mortgage was executed, but honestly believed that it was then or had been satisfied, although mistaken on that point, the second mortgagee would not be charged with notice of its existence.

As to whether, where in such a case the attorney had knowledge of the existence of the prior mortgage, and had it in his possession, and was charged with the duty of having it recorded, and so the duties he owed his two principals were conflicting, the second principal would be charged with the knowledge of the agent, *quære*.

Constant v. University of Rochester (22 J. & S. 515) reversed.

(Argued October 22, 1888; decided January 15, 1889.)

APPEAL by defendant, the University of Rochester, from a judgment of the General Term of the Superior Court of the city of New York, entered upon an order made January 3, 1887, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term. (*Mem.* of decision below, 22 J. & S. 517.)

This action was brought to foreclose a mortgage dated February 17, 1883, executed by Elizabeth Meehen, then the owner of the mortgaged premises, and her husband, to plaintiff's testator. The said defendant set up a title acquired by purchase upon sale under a judgment in a foreclosure suit, upon a mortgage executed to it by Mrs. Meehen and her husband, dated January 10, 1884, and recorded January 11, 1884. At

111	604
118	548
111	604
133	641
111	604
150	187
111	604
d155	59
111	604
f164	857
j164	863
j164	864

Statement of case.

the time of the sale plaintiffs' mortgage had not been recorded, and said defendant denied any notice or knowledge of its existence until the commencement of this action, and claimed its mortgage to be the prior lien.

The facts, so far as material, are stated in the opinion.

Martin W. Cooke for appellant. Plaintiffs having brought defendant into court upon a claim based on an instrument presumptively void as to defendant, they could not maintain an action upon it against defendant without proof of facts rebutting such presumption, and, under objection, they could not prove them without appropriate allegations. (*Hetzel v. Barber*, 69 N. Y. 1, 9; *Freeman v. Shroeder*, 43 Barb. 618; *Peabody v. Roberts*, 47 id. 91; *Crofut v. Wood*, 3 Hun, 571, 573; *Pope v. Waring*, 76 N. Y. 463, 469.) The relinquishment by the university for the mortgage in question, of the security which it held by its \$9,000 mortgage, was a valuable consideration (*Wood v. Chapin*, 13 N. Y., 509, 524; *Cary v. White*, 52 id. 138, 143; *Picket v. Barrow*, 29 Barb. 505; *Webster v. Van Steenburgh*, 46 id. 211.) The court erred in its conclusion that the University of Rochester had constructive notice of the Constant mortgage at the time of receiving its mortgage. In any event, knowledge in Deane occupying the relation to all parties interested, which he must have occupied, could not bind either party in favor of the other. (*Hope Fire Ins. Co. v. Cambreling*, 3 T. & C., 496; 1 Hun, 493; *Voltz v. Blackmar*, 64 N. Y. 440, 446; *Bk. of Pittsburg v. Whitehead*, 36 Am. Dec. 186, 191, 192, 193; *Wassel v. Reardon*, 54 id. 245, 246; *Loeb v. Hellman*, 13 J. & S. 336; *Marie v. Garrison*, 13 Abb. N. C. 210, 229, 230; *Bruce v. Davenport*, 2 Barb. 349; *Morrison v. O. L. C. R. R. Co.*, 52 id. 173; *National Life Ins. Co. v. Minch*, 53 N. Y. 144; *N. Y. C. Ins. Co. v. Nat. Pro. Ins. Co.*, 14 id. 85, 91; *Olafin v. F. & C. Bk.*, 25 id. 293, 294; *Howard Ins. Co. v. Halsey*, 8 id. 271; *Williamson v. Wood*, 15 id. 354, 360, 362; *Cambridge Valley Bk. v. Delano*, 48 id. 326, 336, 338; *Parker v. Connor*, 93 id. 118.) Constructive

Statement of case.

notice is a legal inference from established facts. (*Birdsall v. Russell*, 29 N. Y. 220; *Clafflin v. Lenheim*, 66 id. 301; *Bennett v. Buchan*, 76 id. 386; Code Civ. Pro., §§ 1631, 1671; *Webster v. Van Steenburg*, 46 Barb. 211.) At the commencement of this action the plaintiff's mortgage was not a lien upon the premises in question. (*Brown v. Johnston*, 7 Abb. N. C. 188; *Kortright v. Cady*, 91 N. Y. 343; *Peck v. Minot*, 3 Abb. Ct. of App. 465; *Coles v. Appleby*, 87 N. Y. 114, 119; *Smith v. Kidd*, 68 id. 130.) The equities in this equitable action are all in favor of the University of Rochester. (*Fisk v. Potter*, 2 Keyes, 64, 75; *Parish v. Wheeler*, 22 N. Y. 494, 508; *Mayor, etc., v. Draper*, 23 Barb. 425, 429; *Briggs v. Easterly*, 62 id. 51; *Jervis v. Smith*, 7 Abb. Pr. 217, 222; *Voorhees v. Seymour*, 26 Barb. 569, 583; *Spraight v. Hawley*, 39 N. Y. 441, 448; *Moore v. Met. Nat. Bk.*, 55 id. 41, 47.) By his acts Mr. Constant became estopped from claiming under this mortgage against the university. (*Blair v. Wait*, 69 N. Y. 113; *Viele v. Judson*, 82 id. 32, 40; *Fireman's Ins. Co. v. Lawrence*, 14 Johns. 55.)

John E. Parsons for respondents. When a lawyer has been put by his client in possession of a bond, mortgage and satisfaction piece, this gives to him the power; and where the mortgagor does actually pay the amount of the mortgage to the lawyer, may imply authority to accept payment. It does not, however, imply any general authority from the client; the authority is limited and applies only to the particular transaction, or, at the most, to other transactions which are similar in character. (*Smith v. Kidd*, 68 N. Y. 130; *Williams v. Walker*, 2 Sandf. 325.) Authority which results from a course of conduct on the part of the agent, which has been approved or acquiesced in by the principal, applies only in cases which are similar in their essential features. (Story on Agency, § 87.) If Deane had both been vested with authority to receive payment of Mr. Constant's mortgage, and had undertaken to exercise the authority, no money was received by him from

Opinion of the Court, per PECKHAM, J.

the Meehens which could be applied to such payment. Without the receipt by Deane of the amount the mortgage would stand. (Story on Agency, §§ 98, 99, note, § 104; *Sweeting v. Pearce*, 7 C. B. [N. S.] 449; *Russell v. Bangley*, 4 B. & Ald. 395.) If Deane had had full authority to receive payment for Mr. Constant, and even if he had received funds which he could use to pay Mr. Constant, he could not, without actual payment, treat Mr. Constant's mortgage as paid, so as to clear the mortgaged property in order to enable him to discharge his own obligation to the university by the mortgage which he gave to it. (Story on Agency, § 78; *De Bouchout v. Goldsmid*, 5 Ves. 211; *Parsons v. Webb*, 8 Greenl. 38.) The omission by Deane to record Mr. Constant's mortgage gave no priority to the mortgage of the university. (Story on Agency, § 140; *Bank of U. S. v. Davis*, 2 Hill, 451; *The Distilled Spirits*, 11 Wall. [U. S.] 356, 366.) The fact that the plaintiff's mortgage was not recorded did not change the character of the action or require any special allegations in the complaint, or justify the dismissal of the complaint. (*Drury v. Clark*, 16 How, 424; 3 R. S. [7th ed.] 2215, § 1; *Robinson v. Wheeler*, 25 N. Y. 252; *Seymour v. Van Slyck*, 8 Wend. 403; *Jackson v. Hill*, 5 id. 532; *People v. Snyder*, 41 N. Y. 397; *Page v. Waring*, 76 id. 463, 469.)

PECKHAM, J. In taking the mortgage of January, 1884, we think the university occupied the position of mortgagee for a valuable consideration. It surrendered a prior mortgage, with the accrued interest thereon, and took the mortgage in question. If the university be not chargeable with notice of the prior mortgage to Constant, which was unrecorded, then its own mortgage is the prior lien as between the two. The first important question arising is, did Deane, who acted in the transaction as the attorney and agent for the university at the time of the execution of the mortgage to the university, have knowledge of the existence of the prior mortgage to Constant, executed in February, 1883, and which he then took as agent for Constant? In other words, is there any proof that he in January, 1884, had that fact present in his mind and recollec-

Opinion of the Court, per PECKHAM, J.

tion, so that it can be said from the evidence that he then had knowledge of its existence as an unpaid, outstanding obligation? The transaction out of which the mortgage to the university arose occurred eleven months subsequent to the transaction out of which the mortgage in suit arose; and the former mortgage was neither a part of the same transaction as the latter, nor had it the least connection therewith. Under the law, as decided by the older cases in England, such fact would have been an absolute defense to the claim that there was any constructive notice to the defendant arising out of notice to its agent, because such notice was in another and entirely separate transaction. In *Warrick v. Warrick*, decided by Lord Chancellor HARDWICKE in 1745 (3 Atk. 291, 294), that able judge assumed it as unquestioned law that notice to the agent, in order to bind his principle by constructive notice, should be in the same transaction. He said: "This rule ought to be adhered to, otherwise it would make purchasers and mortgagees' title depend altogether on the memory of their counselors and agents, and oblige them to apply to persons of less eminence as counsel, as not being so likely to have notice of former transactions." Cases were continually arising subsequent to that case wherein the principle was assumed as the law of England, although the cases did not in their facts absolutely call for a decision on that point.

But in *Mountford v. Scott* (1 Turn. & R. Ch. 274), upon an appeal from a decision of the vice-chancellor, Lord Chancellor ELDON said that the vice-chancellor proceeded upon the notion that notice to a man in one transaction is not to be taken as notice to him in another transaction. The lord chancellor continued: "In that view of the case it might fall to be considered whether one transaction might not follow so close upon the other as to render it impossible to give a man credit for having forgotten it." He further said that he would be unwilling to go so far as to say that if an attorney has notice of a transaction in the morning he shall be held in a court of equity to have forgotten it in the evening; that it must, in all cases, depend upon the circumstances.

Opinion of the Court, per PECKHAM, J.

In *Hargreaves v. Rothwell* (1 Keen's Ch. 154), Lord LANGDALE, master of the rolls, held that where one transaction is closely followed by and connected with another, or where it is clear that a previous transaction was present to the mind of the solicitor when engaged in another transaction, there is no ground for a distinction by which the rule, that notice to the solicitor is notice to the client, should be restricted to the same transaction.

In *Nixon v. Hamilton* (2 Dru. & Wal. Irish Ch. 364, decided in 1838), Lord Chancellor PLUNKET adverted to the rule as to the necessity of notice in the same transaction, and stated, if it were notice acquired in the same transaction, necessarily the principal was to be charged with the knowledge of the agent; but if it were notice received by him in another transaction, then such notice was not to affect the principal unless he actually had the knowledge at the time of the second transaction. (See, also, the case of *Dresser v. Norwood*, decided in the Court of Exchequer Chamber, and reported in 17 Com. Bench [N. S.] 466.)

This modification of the old English rule is recognized in the comparatively late case of *The Distilled Spirits* (11 Wall. 356). Mr. Justice BRADLEY, in delivering the opinion of the Supreme Court of the United States, stated that the doctrine in England seems to be established that, if the agent at the time of effecting a purchase has knowledge of any prior lien, trust or fraud affecting the property, no matter when he acquired such knowledge, his principal is affected thereby. If he acquire the knowledge when he effects the purchase, no question can arise as to his having it at that time. If he acquired it previous to the purchase, the presumption that he still retains it and has it present to his mind will depend upon facts and other circumstances. Clear and satisfactory proof that it was so present seems to be the only restriction required by the English rule as now understood. And the learned justice states that the rule, as finally settled by the English court, is, in his judgment, the true one, and is deduced from the best

Opinion of the Court, per PECKHAM, J.

consideration of the reasons on which it is founded. In this opinion the whole court concurred.

Story, in his work on Agency (§ 140), says: "But unless notice of the fact come to the agent while he is concerned for the principal, and in the course of the very transaction, or so near before it that the agent must be presumed to recollect it, it is not notice thereof to the principal. For otherwise the agent might have forgotten it, and then the principal would be affected by his want of memory at the time of undertaking the agency. Notice, therefore, to the agent before the agency is begun, or after it has terminated, will not ordinarily affect the principal."

In *Bank of the United States v. Davis* (2 Hill, 451), it was held that the principal is deemed to have notice of whatever is communicated to his agent while acting as such in a transaction to which the communication relates. And it was held in that case that notice to a bank director or knowledge obtained by him while not engaged officially in the business of the bank would be inoperative as notice to the bank.

In *Holden v. New York and Erie Bank* (72 N. Y. 286), the rule was explained, and it was therein held that where an agency was in its nature continuous and made up of a long series of transactions of the same general character, the knowledge acquired by the agent in one or more of the transactions is to be charged as the knowledge of the principal and will affect the principal in any other transaction in which the agent as such is engaged and in which the knowledge is material. In that case it will be seen, upon reading the very able opinion of FOLGER, Ch. J., that there was no question as to the knowledge of the agent of the various facts, and the only question raised was whether it should be imputed to his various principals in the transactions.

In *Cragie v. Hadley* (99 N. Y. 131), the doctrine that the knowledge of the agent should come to him in the identical transaction was alluded to, and it was held that it was not necessary in all cases that the notice should be thus given, and that notice to an agent of a bank intrusted with the manage-

Opinion of the Court, per PECKHAM, J.

ment of its business was notice to the corporations in transactions conducted by such agent, acting for the corporation in the scope of his authority, whether the knowledge of the agent was acquired in the course of a particular dealing or on some prior occasion. (See, also, *Welsh v. German American Bk.*, 73 N. Y. 434; *Atlantic State Bk., etc. v. Savery*, 82 id. 291).

From all these various cases it will be seen that the farthest that has been gone in the way of holding a principal chargeable with knowledge of facts communicated to his agent, where the notice was not received, or the knowledge obtained, in the very transaction in question, has been to hold the principal chargeable upon clear proof that the knowledge which the agent once had, and which he had obtained in another transaction, at another time and for another principal, was present to his mind at the very time of the transaction in question. Upon a careful review of the testimony in this case, we have been unable to find any such proof. It is true the learned trial judge finds that, contemporaneously with the execution of the mortgage to the university, Deane caused to be made a statement, upon the basis that the amount was to be loaned to the mortgagors, and that, out of the money coming to them as a consideration for the mortgage to the university, the amount of the bond and mortgage to the plaintiff's decedent, with interest, was to be paid, and that mortgage was to be satisfied. And he further found, that the university, through Deane, had notice of the mortgage of the plaintiff's decedent in connection with, and as part of, any proposed transaction by which there was to be loaned to the mortgagor the amount of the bond and mortgage to the university. What is meant by the word "contemporaneously," as used in this finding, is, perhaps, not absolutely clear. If it meant that the statement mentioned was procured to be made by Deane, as a part of and coincident with the execution of the mortgage to the university, it is not, as we think, based upon any evidence. There is no proof whatever in this case that Deane procured this statement to be

Opinion of the Court, per PECKHAM, J.

made by anybody, and Deane himself says that a statement of this nature would, by the course of practice in his office, have come to him (made by some one in his office), the day after the loan was closed. He does not pretend to recollect this particular statement, nor is there any evidence that he procured it to be made. His testimony shows that he had no special recollection of the things which took place upon the occasion of the execution of the bond and mortgage to the university, further than appeared by his books and other memoranda then made by others; and he does not pretend to say that this particular statement was presented to him, or that he had the least knowledge of its existence, or of the facts therein stated, until the day after the closing of the transaction, and the execution of the mortgage to the university.

This is every particle of evidence that there is upon which a finding could be based, such as the learned judge made of knowledge or notice on the part of Deane of the existence of the Constant mortgage at the time of the transaction with the university, and the execution of the mortgage to it. The other facts in the case uncontradicted are that, for some years prior to January, 1884, Deane and the plaintiffs' decedent were acting together, and that the plaintiffs' decedent was, weekly and even almost daily, in the habit of investing large amounts of money upon mortgages of this nature, and that the dealings of plaintiffs' decedent in these various building mortgages, through Deane's office, had amounted, at the time of the mortgage to the university, in the aggregate, to three millions of dollars, if not more; that the mortgages were of all sizes, from six up to forty thousand dollars. It also appears that this very mortgage in suit was found after the execution of the university mortgage in a pigeonhole in which satisfied mortgages were kept, and was found by the assignee of Deane after the assignment was made.

There is no proof in the case showing that Deane made any pretense of remembering, at the time of the execution of the mortgage to the university, that, eleven months before, he had taken a mortgage on the same property for the plaintiffs'

Opinion of the Court, per PECKHAM, J.

decedent, which was not recorded. Taking into consideration the enormous amount of business done by Deane for Constant of this same general nature, and the length of time that elapsed since the taking of the Constant mortgage by him, and the fact that it was never taken from the office by the mortgagee, and that it remained there and was found in a pigeonhole appropriated to satisfied mortgages, and that on the very statement in question upon which the learned judge evidently based his finding, it is alluded to as satisfied; all these facts would tend to show very strongly that Deane had no recollection whatever of the existence of the Constant mortgage as an existing lien at the time he took the mortgage to the university.

But the burden is upon the plaintiff to prove, clearly and beyond question, that he did, and it is not upon the defendant to show that he did not have such recollection. And we think that there is a total lack of evidence in the case which would sustain the finding that Deane had the least recollection on the subject at the time of the execution of the university mortgage. Under such circumstances we think it impossible to impute notice to the university, or knowledge in regard to a fact which is not proved to have been possessed by its agent. If such knowledge did not exist in Deane at the time of his taking the mortgage to the university, then the latter is a *bona fide* mortgagee for value, and its mortgage should be regarded as a prior lien to that of the unrecorded mortgage of Constant which is prior in point of date. The plaintiffs are bound to show by clear and satisfactory evidence that when this mortgage to the university was taken by Deane, he then had knowledge, and the fact was then present to his mind, not only that he had taken a mortgage to Constant eleven months prior thereto on the same premises, which had not been recorded, but that such mortgage was an existing and valid lien upon the premises, which had not been in any manner satisfied. If he recollected that there had been such a mortgage, but honestly believed that it was or had been satisfied, then, although mistaken upon that point, the university could

Opinion of the Court, per PECKHAM, J.

not be charged with knowledge of the existence of such mortgage.

Quite a strong reason for not imputing knowledge to the agent in this case, unless upon evidence clear and satisfactory, is that, if he had such knowledge, and thus knowingly took an utterly worthless security for his principal, he acted in the most improper and dishonest manner, and willfully caused a loss to his principal of, substantially, the whole amount of the money represented by the mortgage which he took as a second lien. While this consideration is not controlling, if the evidence justified the assumption, it is yet of considerable weight, and adds to the propriety of the rule requiring clear proof of such knowledge at the very time of taking the mortgage to the university.

One other question has been argued before us which has been the subject of a good deal of thought. It is this: Assuming that Deane had knowledge of the existence of the Constant mortgage at the time of the execution of the mortgage to the university, is his knowledge to be imputed to the university, considering the position Deane occupied to both mortgagees?

While acting as the agent of Constant in taking the mortgage in question as security for the funds which he was investing for him, it was the duty of Deane to see that the moneys were safely and securely invested. The value of the property was between eleven and twelve thousand dollars; and it was obviously the duty of Deane to see to it that the mortgage which he took upon such property as a security for a loan of \$6,000 for Constant should be a first lien thereon. (*Whitney v. Martine*, 88 N. Y. 535.) In order to become such first lien it was the duty of Deane to see to it that the Constant mortgage was first recorded. In January, 1884, when acting as agent for the university to invest its moneys, he owed the same duty to the university that he did to Constant, and it was his business to see to it that the security which he took was a safe and secure one. Neither mortgage was safe or secure if it were a subsequent lien to the other upon this property. This

duty he continued to owe to Constant at the time he took the mortgage to the university.

At the time of the execution of the latter mortgage, therefore, he owed conflicting duties to Constant and to the university, the duty in each case being to make the mortgage to each principal a first lien on the property. Owing these conflicting duties to two different principals, in two separate transactions, can it be properly said that any knowledge coming to him in the course of either transaction should be imputed to his principal? Can any agent occupying such a position bind either principal by constructive notice? It has been stated that in such a case where an agent thus owes conflicting duties, the security which is taken or the act which is performed by the agent may be repudiated by his principal, when he becomes aware of the position occupied by such agent. (Story on Agency, § 210.)

The reason for this rule is, that the principal has the right to the best efforts of his agent in the transaction of the business connected with his agency, and where the agent owes conflicting duties he cannot give that which the principal has the right to demand, and which he has impliedly contracted to give. Ought the university to be charged with notice of the existence of this prior mortgage when it was the duty of its agent to procure for it a first lien, while, at the same time, in his capacity as agent for Constant, it was equally his duty to give to him the prior lien? Which principal should he serve? There have been cases where, in the sale and purchase of the same real estate, both parties have employed the same agent, and it has been held under such circumstances that the knowledge of the agent was to be imputed to both of his principals. If, with a full knowledge of the facts that his own agent was the agent of the other, each principal retained him in his employment, we can see that there would be propriety in so holding; for each then notes the position which the agent has with regard to the other, and each takes the risk of having imputed to him whatever knowledge the agent may have on the

subject. (See *Le Neve v. Le Neve*, 1 Ambler's Reports, 436, HARDWICKE, Chancellor, decided in 1747; *Toulmin v. Steere*, 3 Merivale, 209, decided in 1817, by Sir WALTER GRANT, Master of the Rolls.) The case of *Nixon v. Hamilton*, already referred to, decided by Lord PLUNKET, Lord Chancellor, in the Irish Court of Chancery, in 1838 (2 Drury & Walsh, 364), is a case in many respects somewhat like the one at bar, so far as this principle is concerned, if it be assumed that Deane really had the knowledge of the prior mortgage as an existing lien. It will be observed, however, upon examination of it, that the question whether the knowledge of the common agent in two different transactions with two different principals was notice to the second principal was not raised with reference to this particular ground. The whole discussion was upon the subject of imputing the knowledge of the agent to the second mortgagee, of the existence of the prior mortgage, which knowledge was not obtained in the last transaction. Whether such knowledge should or should not be imputed to the second mortgagee, because of the conflicting duties owed by the common agent, was not raised. The only defense set up was that the information did not come to the agent of the second mortgagee in the course of transacting the business of the second mortgagee, and the question was simply whether such knowledge could be imputed to the second mortgagee, because of the knowledge acquired by his agent at another time, in another transaction, with another principal. The court held, that where it appeared, as in this case it did appear, fully and plainly, that the matter was fresh in the recollection and, fully within the knowledge of the agent, and under such circumstances, that it was a gross fraud on the part of the agent, in the first place in keeping a prior mortgage off the record, and in the second place, in not communicating the knowledge which he had to his principal, the second mortgagee, that in such case the second mortgagee was charged with the knowledge of his agent.

Whether the same result would have been reached if the

Dissenting opinion, per GRAY, J.

other ground had been argued we cannot, of course, assume to decide. I have found no case precisely in point where the subject has been discussed and decided either way. I have very grave doubts as to the propriety of holding in the case of an agent, situated as I have stated, that his principal in the second mortgage should be charged with knowledge which such agent acquired in another transaction at a different time while in the employment of a different principal, and where his duties to such principal still existed and conflicted with his duty to his second principal. We do not deem it, however, necessary to decide the question in this case.

For the reasons already given the judgment should be reversed and a new trial ordered, with costs to abide the event.

GRAY, J. (dissenting.) The question presented by this appeal seems to possess sufficient interest to call for a brief statement of the grounds, upon which we dissent from the views entertained by a majority of the court.

With respect to the transaction of the loan to the university, Deane was, of course, not acting in any sense as the agent of Constant. In that transaction Constant had no interest. But as Constant's agent, with respect to his mortgage, Deane owed him a duty. He should have advised him of the contemplated mortgage to the university, so that his own mortgage might be recorded and made the prior lien. In failing to do so he violated his duty. In the transaction of the loan to the university, he was its agent; but was chargeable with the knowledge of the prior unsatisfied and unrecorded mortgage to Constant. That knowledge was imputable to his principal, the university, and affected it with such notice as to deprive it of the protection which, otherwise, it would have been entitled to under the recording act. Its rights were made, thereby, subject to those of Constant. The transaction in which the university was engaged was an independent one; but in it the knowledge of the agent who conducted it was visitable upon his principal.

The trial judge found that Deane had knowledge of the Constant mortgage at the time of the transaction of the university loan, and I think the evidence supports such a finding in the proof of the circumstances attending it.

The general rule is not open to dispute that notice to the agent is notice to the principal. If the agent has knowledge of a fact, while he is acting for the principal, in the course of the very transaction which becomes the subject of the suit, this operates as constructive notice to the principal himself. For, upon general principles of policy, it must be taken for granted that the principal knows what the agent knows.

"To constitute constructive notice, it is not indispensable that it should be brought home to the party himself. It is sufficient if it is brought home to the agent, attorney or counsel of the party; for in such cases the law presumes notice in the principal, since it would be a breach of trust in the former not to communicate the knowledge to the latter." (Story's Eq. Jur. § 408.) These rules are well recognized as underlying the law of principal and agent. In their application to agents of a corporation, they were asserted recently by ANDREWS, J., in *Cragie v. Hadley* (99 N. Y. 131). In *Brotherton v. Hatt* (2 Vern. 574), A. made three several mortgages to B. C. and D., and in the last mortgage B. is a party and agrees that after he is paid he will stand trustee for D. It was decreed by the master of the rolls, and affirmed by the lord keeper, that the second mortgagee, C., should be paid before D.; for the same scribes being employed in all transactions, notice to them of C.'s mortgage was notice to D. In *Norris v. Le Neve* (3 Atk. 26, 35), a bill of review (which is granted upon discovery of new matter not known before the decree) was refused by Lord HARDWICKE, where it appeared that the parties' attorney, solicitor or agent, in an ejectment upon the same title tried prior to the decree, had in his possession, at the time of that trial, the documents from which the new matter was collected. In *Nixon v. Hamilton* (2 Dru. & W. 364), W. B., a land and law agent of F. H., negotiated a deed of separation and maintenance between F. H. and his wife, and

Dissenting opinion, per GRAY, J.

by fraud prevented its registry. Four years afterwards he was employed in the negotiation of a loan of money, which was advanced on a registered mortgage of the estates comprised in the deed of maintenance, as solicitor both for F. H. and the lender. In a contest for priority between the unregistered deed of maintenance and the registered mortgage, it was held that, inasmuch as the knowledge acquired in the transaction of the deed of maintenance was brought home to W. B. and its continuance so clearly proved as to make it fraudulent on his part to conceal it, when acting in the mortgage transaction, such fraud on the part of W. B., the agent, was visitable on his principal, the lender, and that the latter should be treated as one, who, through his agent, had actual notice of the deed of maintenance, and that, consequently his, deed should be postponed to the wife's unregistered deed.

LORD PLUNKET, in *Nixon v. Hamilton*, said: "If, from the circumstances of the case, it satisfactorily appeared that the attorney, at the time of the second transaction, had full knowledge and recollection of the first transaction, it was fraudulent in him to conceal it from his principal, and, if so, the principal should not be at liberty to derive a benefit from the fraud of his attorney. * * * However acquired, if it (knowledge) existed at the time of the second transaction, it was fraud to conceal it, and this fraud of the attorney should be visited on the principal." It has been held that where, in the purchase of real estate, the same agent is employed for both parties, each side is affected with notice as much as if different agents had been employed. (*Ambler*, 439.) In *Toulmin v. Steere* (3 Merivale, 210), where the purchaser of an estate employed the vendor's agent, who had notice of an existing incumbrance which affected it, the master of the rolls held that such notice to the agent operated constructively as a notice to his employer, notwithstanding an infant was interested in the purchase.

In *Champlin v. Laytin* (6 Paige, 203), Chancellor WALWORTH said: "For certain purposes and where the equitable rights of third persons are concerned, it has been found neces-

Dissenting opinion, per GRAY, J

sary by this court to hold a purchaser to be chargeable with constructive notice of all the facts communicated to his attorney or agent for the purchase or in the examination of the title, and that notice of the existence of a deed was good constructive notice of the contents of the deed itself, especially if it was one of the deeds under which the purchaser derived his title to the premises." (*Griffith v. Griffith*, 9 Paige, 317.)

The conclusion at which I have arrived, after the examination of this record, is that the university was chargeable with notice of the existing unrecorded mortgage, through the knowledge coming to its agent and attorney, Deane, and it cannot, therefore, be regarded as a subsequent purchaser in good faith. In *Paige v. Waring* (76 N. Y. 463, 469, 470), there is nothing conflicting with my views. Judge EARL recognizes the well-settled rule that the valuable consideration required by the statute to support a subsequent conveyance must be accompanied by the element of good faith; that is to say, an absence of notice of the previous unrecorded conveyance.

There can be no reasonable doubt as to his complete representation of the university as its agent, attorney, and, indeed, managing trustee, in the transaction forming the subject of this investigation; while, in refusing to find any facts showing Deane to have been at the time, in the transaction, empowered to represent or bind Constant, the learned trial judge was sustained by the absence of proofs to establish them. This is not a question of morals; but one simply as to what is the legal conclusion from the facts disclosed by the proofs.

I think the judgment at Special Term was right, and that the judgment of the General Term affirming the same should be affirmed by this court.

All concur with PECKHAM, J., for reversal, except ANDREWS and GRAY, JJ., dissenting.

Judgment reversed.

Statement of case.

CHARLES S. CLARKE, Appellant, v. THE MAYOR, ALDERMEN
AND COMMONALTY OF THE CITY OF NEW YORK, Respondent.

The provision of the act of 1859 "in relation to taxes and assessments in the city of New York" (Laws of 1859, chap. 302, § 8), requiring the commissioners of taxes and assessments to keep the books containing the "annual record of the assessed valuation of real and personal estate" open for examination and correction "from the second Monday of January until the first day of May in each and every year," does not include the day last mentioned; a tax, therefore, is not invalidated by the fact that the books having been kept open through April thirtieth were closed to the public on the first day of May.

Where a tax upon real estate is properly imposed under said act, which is unpaid and a sale is made in conformity to law, any defect in the certificate or lease executed to the purchaser does not impair or affect the sale or authorize him to recover back the purchase-money. This right only exists where the sale is absolutely void for want of jurisdiction

(Argued November 26, 1888; decided January 15, 1889.)

APPEAL from order of the General Term of the Superior Court of the city of New York, made January 3, 1888, which reversed a judgment in favor of plaintiff entered upon a verdict directed by the court. (Reported below, 23 J. & S. 259.)

This action was brought to recover back \$3,190.65, money paid by plaintiff as purchaser of lands sold on the 7th of May, 1883, for the non-payment of taxes, under the direction of the comptroller of the city of New York.

Plaintiff received the usual certificate of sale, and subsequently, the premises not being redeemed, he surrendered the certificate and took from the city a paper purporting to be a lease for the term of years mentioned in the certificate. He alleges the lease to be void, and that he received no value for the money paid. The facts upon which the claim was based, so far as material, are stated in the opinion.

John Townshend for appellant. A proceeding to collect a tax by a sale for default, in payment by the person taxed, consists of many parts, steps or links; if any one of those links is invalid, the whole proceeding fails. (*Doughty v.*

Opinion of the Court, per DANFORTH, J.

Hope, 3 Denio, 599; *Sharp v. Speir*, 4 Hill, 86.) The alleged taxes were void, because the books of record were closed on April thirtieth, instead of on May first, and because the commissioners did not, in the manner required by law, advertise that books would be kept open, etc. (Laws of 1859, chap. 302, § 8; *King v. Stevens*, 5 East, 244; *Kendall v. Kingsley*, 120 Mass. 94; *Isaac v. Ins. Co. L. R.*, 5 Exch. 296; *Bellhouse v. Mellor*, 4 H. & N. 120; *Abeel v. Alexander*, 45 Ind. 523; *Webster v. French*, 12 Ill. 302; *Thomas v. Douglass*, 2 Johns. Cas. 224; *King v. Stevens*, 5 East, 244; *People v. Walker*, 17 N. Y. 502; *Apgar v. Hayward*, 18 N. Y. S. Rep. 169, 173.) The right to object to the assessment is an important prerogative of the taxpayer, one which the courts will guard with jealous care. Any abridgment of this right will render the tax void. The omission to give the notice is a jurisdictional defect. (*Jewell v. Van Steenburg*, 58 N. Y. 86.) The provisions for being heard being of vital importance to the taxpayer must be regarded as compulsory, and the compliance with them as conditions precedent to any further step to charge him with a tax. (Cooley on Taxation, 267; *Thames Co. v. Lathrop*, 7 Conn. 550; *State v. Jersey City*, 25 N. J. 308; *Sioux City v. Washington Co.*, 3 Neb. 30; *Adriance v. McCafferty*, 2 Robt. 153.)

D. J. Dean for respondent. The word "until" is ordinarily to be taken in an exclusive sense, and the books were not required by it to be kept open during May first. (*People v. Walker*, 17 N. Y. 502; *Sands v. Lyon*, 18 Conn. 27; *People v. Luther*, 1 Wend. 42; *Webster v. French*, 12 Ill. 302.)

DANFORTH, J. We have carefully examined the various points made by the appellant, and think none important except those which relate to the validity of the sale. If the sale was valid, errors or defects in the subsequent proceedings are of no importance upon the question raised in this action.

First. It is argued that the taxes, for the non-payment of which the sale was made, were void. They were imposed in

Opinion of the Court, per DANFORTH, J.

1877, 1878 and 1879, and under the act then in force the tax commissioners were required to have in their office books "to be called the annual record of assessed valuation of real and personal estate," and keep them "open for examination and correction, from the second Monday in January until the first day of May in each year," but the statute declares that "on said last mentioned day the same shall be closed to enable the commissioners to prepare assessment rolls," etc. (Laws of 1859, chap. 302, § 8.) They were kept open from the time specified through April, but no longer, and in this the appellant says the commissioners erred, the contention being that the word "until" is inclusive, and required the books to be open for inspection and examination through the first day of May. The authorities cited by counsel show that the word is variously used, sometimes as inclusive and again as exclusive, and that no fixed rule has been laid down in regard to it. In each instance its construction must depend upon the circumstances and subject-matter of the case presented. By itself, however, it marks a limitation of time, and its more obvious meaning requires the exclusion of the day named (*People v. Walker*, 17 N. Y. 502); and in construing the clause now in question, we treated the word as of like import with the phrase "up to" (*Apgar v. Haywood*, 110 N. Y. 225), or as excluding that which came after. The context also shows that the word was used in that sense by the legislature. During the interval between the second Monday of January and the first day of May the books were to be open to the taxpayer for inspection and for correction, if necessary, but on the day last named they are by statute devoted to another use, exclusive in its nature, for at that time the commissioners are, from those books, to prepare assessment-rolls. They must then be in their hands with no interruption from the public, and this could not be if the latter had at the same time a right to inspect or examine them.

Second. The other objections made by the appellant are immaterial in this action. They relate to irregularities merely and not to matters affecting jurisdiction. The taxes were

Statement of case.

properly imposed; they remained unpaid and a sale was authorized by statute; it was conducted in conformity to law, and at that moment the rights of the parties to the transaction became fixed. The vendor was entitled to the price bid, the purchaser to have a valid certificate, and in due time, upon the happening of the contingencies named in the statute, a lease. If those he has obtained are either informal or invalid by reason of the omission of any statutory condition or irregularity respecting such instruments, the defects do not impair the sale, and consequently leave in full force the contract upon which he paid his money.

The case of *Chapman v. City of Brooklyn* (40 N. Y. 372), upon which the appellant chiefly relies, presented a sale absolutely void for want of jurisdiction or power in the city to make it, and one where, from the very inception of the assessment proceedings, the statute had been disregarded. The other cases referred to appear to be irrelevant, if the view we have taken of the principal question is correct, and require no discussion.

It follows that the order appealed from should be affirmed, and the defendant have judgment absolute, with costs.

All concur.

Order affirmed and judgment accordingly.

In the Matter of the Probate of the Will of HENRY C. BULL,
Deceased.

Under the amendment of the section of the Code of Civil Procedure making provision for the trial by jury of controverted questions of fact arising in proceedings in Surrogate's Court (§ 2547) made in 1886 (Chap. 119, Laws of 1886), which authorizes the surrogate of the county of New York, in his discretion, to transfer to the Court of Common Pleas proceedings for the probate of a will, for the purpose of having the issues of fact therein tried by a jury, and provides for the review of the verdict of a jury, this court is not given jurisdiction, on appeal to it from an order of the General Term affirming the verdict, to review the

Statement of case.

questions of fact for the purpose of determining whether the verdict was against the weight of evidence; its jurisdiction is limited to the review of questions of law. (§ 1887.)

(Argued November 26, 1888; decided January 15, 1889.)

APPEAL from an order of the General Term of the Court of Common Pleas for the city and county of New York, made May 7, 1888, which affirmed an order of the trial court denying a motion for a new trial and to set aside a verdict.

The proceeding was instituted before the surrogate of the county of New York for the probate of an instrument purporting to be the last will of Henry C. Bull, deceased. Objections having been filed, the matter was transferred to the Common Pleas for trial of the issues of fact under section 2547 of the Code of Civil Procedure, as amended by chapter 119 of the Laws of 1886.

The questions presented to the jury and their answers thereto were as follows :

"*First.* Was the paper propounded as the last will of Henry C. Bull executed and acknowledged by him at Bunker Hill, Macoupin county, in the State of Illinois? To that question the jury, by direction of the court, answered yes.

"*Second.* Did Henry C. Bull sign said paper at said Bunker Hill on December 4, 1884, in the presence of James T. Pennington and George Stephenson, and did Henry C. Bull request said Pennington and Stephenson to sign their names as witnesses to said paper, and did said Pennington and Stephenson then and there sign their names as witnesses to said paper in the presence of said Bull and in the presence of each other, and did said Bull declare said paper to be his free act? To that question the jury, by direction of the court, answered yes.

"*Third.* At the time of the execution of the paper propounded as the last will of Henry C. Bull, was Henry C. Bull of sound mind, memory and understanding and competent to make a will? Answer, no.

Statement of case.

"*Fourth.* At the time of the execution of said paper by said Henry C. Bull, did Henry C. Bull know the contents thereof and understand what disposition it made of his property? Answer, no.

"*Fifth.* Was the said paper procured by undue influence practiced upon said Henry C. Bull? To that question the jury, by direction of the court, answered no."

The further facts, material to the questions discussed, are stated in the opinion.

Joseph H. Choate for appellant. The testator was legally competent to make a will. (3 R. S. 2283, § 1; *Id.* 2285, § 21; *Stewart v. Lispenard*, 26 Wend. 301; *Jackson v. King*, 4 Cow. 216, 217; *Gombault v. Public Administrator*, 4 Bradf. 226; 1 Redf. Law of Wills, 63; *Stanton v. Wetherowax*, 16 Barb. 263; *Lewis v. Jones*, 60 id. 672; *Breed v. Pratt*, 18 Pick. 115; *Harrison v. Rowan*, 3 Wash. 580; *Stevens v. Van Cleve*, 4 Wash. 262, 267; *Delafield v. Parish*, 25 N. Y. 102; *Van Alst. v. Hunter*, 5 Johns. Ch. 158, 159; *Maverick v. Reynolds*, 2 Brad. 384; *Horn v. Pullman*, 72 N. Y. 276; *Clapp v. Fullerton*, 34 id. 197.) The testator being of sound mind, and knowing that he was making a will of his property, and the persons present being his most intimate friends, one his business partner, and the other his confidential friend, who wrote letters for him, the law does not justify the disregard of such evidence by proof of specific acts, the results of infirmity, age or illness, at other and distant periods. (*Stevens v. Van Cleve*, 4 Wash. 270; *Blanchard v. Nestle*, 3 Den. 41; *Jackson v. King*, 4 Cow. 218; *Gardner v. Gardner*, 34 N. Y. 161; *Cudney v. Cudney*, 68 id. 152; *Marx v. McGlynn*, 88 id. 373.) The legislature is not presumed to intend to change the common law. (*People v. Richards*, 108 N. Y. 144; *McDonald v. Hovey*, 110 U. S. 628, 629; *Potter's Dwaris on Stat.* 185, 186.) The revisers' notes may be examined to ascertain the sources of the statutes which provide that "all persons except idiots, persons of unsound mind and infants,"

Statement of case.

may make wills." (3 R. S. 2283, § 5; *Stewart v. Lispenard*, 26 Wend. 298, 299; *Blake v. Nat. Bank*, 23 Wall. 317-320; *In re O'Neil*, 91 N. Y. 520; *Willis v. Lowe*, 5 Notes of Cases, 428; Revisers' note to 2 R. S., chap. 6, art. 2, 4 N. Y. Rev.'s Rep.; 2 Black. Com. 496; Coke Litt., 896, Hargrave's, note b; Toller's Law Ex. 9.) To constitute incapacity to make a will, a total deprivation of sense is required. (*Jackson v. King*, 4 Cow. 216; *Odell v. Buck*, 21 Wend. 142; *Petrie v. Shoemaker*, 24 id. 86; *In re Morgan*, 7 Paige, 237; *Newhouse v. Godwin*, 17 Barb. 236; *Davis v. Culver*, 13 How. Pr. 66; *Crolins v. Clark*, 7 Lans. 314; 64 Barb. 117; *Bleecker v. Lynch*, 1 Bradf. 465; *Weir v. Fitzgerald*, 2 id. 59; *Wade v. Holbrook*, 2 Redf. 387; *Blanchard v. Nestle*, 3 Denio, 37; *Clark v. Sawyer*, 2 N. Y. 499.) The court should have given the specific instructions requested as to the testator's competency. (*Guyling v. Van Kuren*, 35 N. Y. 70-72; *Carroll v. Norton*, 3 Bradf. 306; *Bleecker v. Lynch*, 1 id. 458; *Maverick v. Reynolds*, 2 id. 360.) It was error to refuse to charge that, as the proponent has shown that the will was executed in accordance with the formalities prescribed by the statutes of the state of Illinois, the burden of proof is upon the contestants to establish that the decedent was not capable of making a will. (*Delafield v. Parish*, 25 N. Y. 66, 97; *Jackson v. King*, 4 Cow. 216; 108 N. Y. 67; 1 Redf. on Wills, chap. 3, § 4; *Banker v. Banker*, 63 N. Y. 413, 414; *Riggs v. Am. Tract Soc.*; 95 id. 511, 512; *Ean v. Snyder*, 46 Barb. 232; *Brown v. Torrey*, 24 id. 583; *Davis v. Culver*, 13 How. Pr. 66; *Miller v. White*, 5 Redf. 320; *Shaw's Will*, 2 id. 125; *Jackson v. Van Dusen*, 5 Johns. 158; *Stewart v. Lispenard*, 26 Wend. 298, 317; *Stevens v. Van Cleve*, 4 Wash. 269; *Carpenter v. Calvert*, 83 Ill. 71; *Wooley v. Wooley*, 95 N. Y. 231; *In re Cottrell*, Id. 334.) It was error to refuse to charge that the only point of time to be looked at by the jury at which the capacity of the testator is to be tested is that when the will was executed. (*Brown v. Torrey*, 24 Barb. 583; *Whitenack v. Stryker*, 2 N. J. Eq. 11;

Statement of case.

Turner v. Cheeseman, 15 N. J. Ch. 246; *Harrison v. Rowan*, 3 Wash. 586; *Stevens v. Van Cleve*, 4 id. 268; *Blanchard v. Nestle*, 3 Denio, 41; *Jackson v. King*, 4 Cow. 218; *In re Morgan*, 7 Paige, 236; *Davis v. Culver*, 13 How. Pr. 66; *Newhouse v. Godwin*, 17 Barb. 236.) It is error for a judge to submit a question to a jury where there is no evidence to authorize any finding thereon, and it is, for a similar reason, correct to refuse to submit a question unsupported by evidence. (*Algur v. Gardner*, 54 N. Y. 364; *Small v. Smith*, 1 Denio, 583; *Maguire v. Corwine*, 101 U. S. 111; *Michigan Bank v. Eldred*, 9 Wall. 544; *Insurance Co. v. Baring*, 20 id. 162; *U. S. v. One Still, etc.*, 5 Blatch. 407; *Story v. Brennan*, 15 N. Y. 526; 12 Barb. 84; 1 Wend. 511; *Lomer v. Meeker*, 25 N. Y. 361.) The court erroneously overruled legal objections of the proponent to evidence on the part of the contestants. (*Gellatby v. Lowery*, 6 Bosw. 122; *Forrest v. Forrest*, 6 Duer, 102.) The stipulation of proponent's counsel does not cover this evidence. (*In re Ross*, 87 N. Y. 520; *Holcomb v. Holcomb*, 95 id. 316; *Bell v. McMaster*, 29 Hun, 273; *Clapp v. Fullerton*, 34 N. Y. 190; *Hewlett v. Wood*, 55 id. 634; *People v. O'Brien*, 36 id. 276; *People v. Reel*, 42 id. 270; *Matter of Arnold*, 14 Hun, 527, 528; *Briggs v. Waldron*, 83 N. Y. 586; *People v. Buddenstieck*, 103 id. 501; *Winchell v. Winchell*, 100 id. 165; *Ray v. Smith*, 2 Hun, 597; *Foote v. Hamilton*, 78 N. Y. 155; *Baird v. Daly*, 68 id. 547.) When the proof of a fact is on a party who gives no direct evidence thereon, if the other party sees fit to contradict it by introducing evidence to rebut it in anticipation of its proof by his adversary, the introduction of such evidence does not shift the burden or raise a conflict. (*Lerche v. Brasher*, 104 N. Y. 157; *Clark v. Mech. Nat. Bk.*, 11 Daly, 241; 8 id. 481.)

John E. Parsons for respondents. The court has no jurisdiction upon appeal from the affirmance by the General Term of the decision of the surrogate in a probate case to review questions of fact which depend upon conflicting evidence.

Opinion of the Court, per PECKHAM, J.

(*In re Ross*, 87 N. Y. 514; *Davis v. Clark*, Id. 623; *Marx v. McGlynn*, 88 id. 357.) The burden of proof was upon the proponent to establish the mental capacity of the deceased. (*Delafield v. Parish*, 25 N. Y. 984; *Rollwagen v. Rollwagen*, 63 id. 504, 517.) There was no evidence that a different rule prevails in Illinois. The presumption is that the law of that state is the same as the law of this. (*Cheney v. Arnold*, 15 N. Y. 345-353; *First Nat. Bk. of Meadville v. Fourth Nat. Bk. of New York*, 77 id. 320; *Chapin v. Dobson*, 78 id. 74; *Irish v. Newell*, 62 Ill. 196, 202; Statutes of Illinois on Wills, chap. 148.) Parties have no right to expect that the court will, nor is it error for the court to, refuse to adopt a different phraseology suggested by counsel in the shape of requests to charge. (*Raymond v. Richmond*, 88 N. Y. 671; *Kelly v. Jackson*, 6 Peters, 622; *Labor v. Cooper*, 74 Wall. [U. S.] 565; *I., etc., R. R. Co. v. Horst*, 93 U. S. 291; *R. R. Co. v. McCartney*, 96 id. 258.) Henry Bull, one of the residuary legatees, was incompetent to testify to transactions between himself and deceased. (Code of Civil Pro. § 829.) While the act of 1886, chapter 119, provides that the costs shall be taxed in the Surrogate's Court, the awarding of the costs of the appeal lies with the appellate court. (*Schell v. Hewitt*, 1 Dem. 249, 255.)

PECKHAM, J. The question which first arises upon this appeal is as to the extent of our jurisdiction, whether we can review the facts to the same extent as the General Term of the Common Pleas, or whether we are restricted to the review of questions of law only. If this were the ordinary case of an appeal from the General Term affirming a decision of the surrogate admitting or refusing to admit to probate the instrument propounded as a will, the case of *Hewlett v. Elmer* (103 N. Y. 156), would be a direct authority restricting our jurisdiction to a review of questions of law only. It is contended however, that by the amendment made in 1886 to section 2547 of the Code, our jurisdiction is enlarged in the case provided for in that section; and that it is within our power, and con-

tion of the Court, per PECKHAM, J.

our duty, to review the questions of fact for the determining whether the verdict of the jury upon which the judgment was provided for was against the weight of evidence. If so, to grant a new trial, upon that ground. We think the amendment has that effect. It refers to cases in the county of New York only, and even then it is limited to those which the surrogate of that county may certify to transfer to the Court of Common Pleas for the purpose of having a trial by jury in that court, of a special proceeding for the probate of a will pending before the surrogate.

It would require the plainest language to convince us that the legislature meant to enlarge our jurisdiction in certain classes of probate cases coming to this court upon appeal from one county alone in the state while in all the other counties it remained as already and differently provided for by the Code of Civil Procedure. There is certainly no reason in the nature of the case why we should examine questions of fact determined by a jury of the New York Common Pleas in a special proceeding relating to the probate of a will, more than in any other proceeding or action. The reasoning which led to the decision in *Hewlett v. Elmer* (*supra*) leads also to a denial of any such right on our part in the case under consideration. Full effect can be given to the language of the statute (§ 2547), by holding that the right to grant a new trial, because the verdict was against the weight of evidence, is confined to the Court of Common Pleas, and that the prohibition of section 1337 of the Code confines our right of review in the cases arising under section 2547, as in others, to questions of law only. The provision in the last above cited section that "the appeal shall be heard upon a case containing all the evidence" is manifestly for the purpose of allowing the court the benefit of a full record of the evidence taken, in order to be able to carry out the further provision that an error in the admission or exclusion of evidence, etc., may be disregarded if substantial justice does not require that there should be a new trial. We are satisfied that we have no power to review the facts in this case, further than, as is said in *Hewlett v.*

Statement of case.

Emer, to determine whether there is any evidence upon which the verdict of the jury might fairly and reasonably stand. Guided and limited by this rule, we have carefully examined the whole of the record in this case and we are of the opinion that there was an abundance of evidence to sustain the verdict of the jury declaring that the deceased at the time of the execution of the paper propounded as his last will was not of sound mind, memory and understanding, and was incompetent to make a will. It would serve no useful purpose to herein enumerate the various facts which the evidence on the part of the contestants tended to prove, and which also legitimately tended to prove that the deceased at the time of the execution of the paper was *non compos mentis*. The rule as to what constitutes a sound and disposing mind and memory is in this state quite well settled, and each case must depend largely upon its own facts for the determination of that question.

* * * * *

The order should be affirmed with costs.

All concur.

Order affirmed.

BESSIE C. PFEIFFER, as Administratrix, etc., Respondent, v.
JAMES CAMPBELL et al., Appellants.

P., plaintiff's intestate, prepared the general plans and specifications for the construction of a house for defendants under an oral agreement between them. After all the work called for had been done and payments had been made thereon, a writing was signed by the parties in which, after an acknowledgment of receipt by P. of the amount paid, it was stated that this left "a balance due" of a sum stated, which defendants agreed to pay in installments, the last installment when the roof was on. It was then added that this should "be in full for all services for plans of exterior and floor plans on the building." In an action to recover a balance, alleged to be due, defendants claimed that the writing constituted a contract, by which P. agreed to do all the work necessary for finishing the exterior and floor plans, and that this

*The omitted portion of the opinion relates to exceptions taken on the trial, not considered of sufficient general interest to require a report in full.

Statement of case

included a detailed drawing and specifications, and set up as a counter-claim a breach of performance of this contract. *Held*, that the claim was untenable; that the writing amounted simply to a receipt, a promise by defendants to pay the balance then due as specified, and by P. that this should be in full for the work he had then performed; that the balance being then due and the agreement by P. to wait for payment being without consideration was void; but that if valid, it appearing that defendants had not made the payments as agreed, although the action was commenced before the roof was on, but after default on their part, this was no bar to the prosecution of the action.

Evidence was given on the part of P., under objection and exception, that the services were worth much more than the sum agreed upon. The recovery, however, was in accordance with the amount acknowledged in the paper. *Held*, that defendants could not have been injured by the evidence, and so that its reception, if erroneous, was no ground for reversal.

(Argued December 4, 1888; decided January 15, 1889.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made May 3, 1886, which affirmed a judgment in favor of the plaintiff entered upon the report of a referee.

The nature of the action and the material facts are stated in the opinion.

William H. Arnoux for appellants. Technical words are not necessary to constitute a binding contract. (*Barney v. Worthington*, 37 N. Y. 112; *Wheeler v. Allen*, 51 id. 37.) Where there is evidence of a contract, it is not competent to give evidence either that the services are worth more or less than the contract-price as a basis of recovery. (*Trimble v. Stillwell*, 4 E. D. Smith, 512; *Marsh v. Holbrook*, 3 Abb. Ct. App. Dec. 176.) The contract of plaintiff, being for the performance of the work in question — “for all services for plans of exterior and floor plans” — for an entire price, it cannot be severed; and not having been performed, and the performance not having been waived, plaintiff was not entitled to recover. (*Pullman v. Corning*, 9 N. Y. 93; *Smith v. Brady*, 17 id. 173; *Butler v. Butler*, 77 id. 472; *Brown v. Webber*, 38 id. 187.)

Edward M. Shepard for respondent. An extension of time to pay a debt which is owing needs a consideration like

Opinion of the Court, per PECKHAM, J.

any promise; and payment of part of the debt is not such a consideration. (*Kellogg v. Olmstead*, 25 N. Y. 189.) So does a promise to accept in payment less than the amount due need a consideration or a seal. (*Bunge v. Koop*, 48 N. Y. 225; *Hill v. Beebe*, 13 id. 556; *Hunt v. Bloomer*, 5 Duer, 205; *Clafin v. Ostrom*, 54 N. Y. 585.) The benefit of a valid extension to pay a subsisting debt is lost by any default in the extended payments. (*Muldon v. Whitbeck*, 1 Cow. 290, 304; *Tobey v. Barber*, 5 Johns. 68; *Parrott v. Colby*, 6 Hun, 58; 71 N. Y. 597.) If the agreement of employment was what the defendants contended it to be, and if it was the fact that the plaintiff failed to perform some of the agreed work, there was still no evidence that the omission could not be justly and satisfactorily compensated by an allowance to the defendants. And having refused themselves to prove, or to permit others to prove, what would be the amount of such compensation, they were estopped to say that their damage was more than nominal. (*Glacius v. Black*, 50 N. Y. 145; 67 id. 563; *Johnson v. De Peyster*, 50 id. 666; *Phillips v. Gallant*, 62 id. 264; *Woodward v. Fuller*, 80 id. 312.) Under a general complaint for a *quantum meruit* for work, labor and services, plaintiff cannot prove a contract which remains executory on his part, he may prove that the price was fixed by agreement. (Abbott's Trial Evidence, 361, 367, chap. 19, §§ 8, 19; *Higgins v. N. & F. R. R. Co.*, 66 N. Y. 604; *Farron v. Sherwood*, 17 id. 227; *Hosley v. Black*, 28 id. 438.)

PECKHAM, J. This action was brought originally by the present plaintiff's decedent to obtain payment for work, labor and services performed by him as an architect, in drawing plans and specifications for an apartment-house upon the west side of Fifth avenue, between Fifty-eighth and Fifty-ninth streets, in the city of New York. The plaintiff alleged that such work, labor and services were worth the sum of \$9,825.32; that there remained unpaid, at the time of the commencement of the action, the sum of \$5,669, for which sum judgment was demanded, together with interest from the 3d of June,

Opinion of the Court, per PECKHAM, J.

1884. The answer admitted the preparation of plans and specifications, but denied that the work was worth the sum mentioned in the complaint. It further set up a counter-claim, and alleged that the plaintiff's decedent neglected and refused to furnish the plans and detailed drawings in accordance with the agreement, and that, in consequence of such failure, defendants were compelled to procure plans and detailed drawings elsewhere; that they were thereby delayed in the prosecution of the work upon the building, to their damage in the sum of \$5,000. They also alleged, as a separate counter-claim, that the value of plaintiff's services did not exceed the sum of \$1,000, and that they had overpaid him to the amount of \$3,156.50.

Plaintiff replied, denying the allegations set up in the counter-claim. The action was referred to a referee, who found that plaintiff's decedent, an architect in the city of New York, was employed by defendants to prepare general plans and specifications for the construction of the house in question, and that under such employment he prepared, between the 1st of October, 1883, and some time prior to June 3, 1884, general plans and specifications for the construction of such apartment-house; that the reasonable value of the work under such employment was the sum of \$9,409; that plaintiff's decedent had been paid the sum of \$4,156.50, and no more. And he found, as a conclusion of law, that plaintiff was entitled to judgment against the defendants for \$5,252.50, with interest from the 3d of June, 1884, amounting in all to \$5,766.36, for which amount, together with costs, judgment was directed to be entered.

Upon the trial evidence was given, on the part of the plaintiff's decedent, in regard to the employment alleged in the complaint, and tending to show an agreement between the parties for the payment, on account of such services, of the sum of \$10,000. Evidence was also given which tended to show that, on the 3d of June, 1884, defendants had paid plaintiff's decedent (including the payment of \$1,000 made on that day), the sum of \$3,425, and that there was paid,

Opinion of the Court, per PECKHAM, J.

subsequently and before the commencement of this action, \$731.50, making in all \$4,156.50 paid upon the contract. This would make the whole sum \$9,409 as the compensation to plaintiff's decedent for the work, labor and services mentioned in the complaint. There was ample evidence to justify the referee in his finding of fact as to the employment and the amount agreed to be paid therefor. And the judgment of the referee, it will be seen, when added to the payments which had been made, was for a less sum than the contract-price as testified to by the plaintiff's decedent.

Counsel for the defendants, however, claims that the evidence shows that there was a written contract between the parties which differed from the contract as testified to on the part of the plaintiff; and upon the assumption that such written contract was proved, the main questions are raised which were argued in this court.

After all the work had been done which, as plaintiff's decedent claimed, was required of him by and under the oral understanding or contract which he testified to, and after certain payments had been made to him by the defendants, on the 3d day of June, 1884, he had a conversation with the defendants in regard to the payment of the balance due on account of his services. The result of that conversation was the following paper:

"NEW YORK, June 3, 1884.

"Received from James Campbell his note for one thousand dollars, dated this day, on account of architect's fees, leaving a balance *due me* of five thousand nine hundred and eighty-four dollars (\$5,984), which Campbell agrees to pay as follows:

On July 1, 1884.....	\$500 00
On August 1, 1884.....	750 00
On September 1, 1884.....	1,000 00
On October 1, 1884.....	1,000 00
Balance when roof is on.....
	<hr/>
	\$5,984 00
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Opinion of the Court, per PECKHAM, J.

" Which shall be in full for all services for plans of exterior and floor plans on the building on Fifth avenue and Fifty-eighth and Fifty-ninth streets.

" CARL PFEIFFER.

" JAMES CAMPBELL.

" J. D. PHYFE."

The learned counsel for the defendants claims that this paper formed a contract between the parties, and that by it the plaintiff's decedent agreed to do all the work necessary for the plans for the exterior and floor plans of the building, and that such agreement included detailed drawings, or specifications, which the plaintiff's decedent, in his oral testimony, distinctly swore were not included in his agreement with the defendants, and which, as matter of fact, he did not make. We think that no such construction can be given to the paper as is claimed. It seems to us, on its face, to be simply the acknowledgment of the receipt from James Campbell, one of the defendants, of his note for \$1,000, which was to be a payment on account of the architect's fees, and an acknowledgment that after such payment there would remain due the balance stated in the receipt, and that Campbell therein agreed to pay that balance in monthly payments up to a certain amount, the balance thereof to be paid when the roof of the building was on, and that this sum, that is, the balance then due, was to be in full for all the services which the plaintiff's decedent had then performed. Under the agreement, as testified to by the plaintiff's decedent, he had then performed all the services which he had agreed to perform, and there remained only the duty on the part of the defendants to pay to the plaintiff the balance of the compensation agreed upon, all of which was then due.

While this payment was thus due (the services having been performed), this conversation was had between the plaintiff's decedent and the defendants by which, without consideration, he agreed to accept payment of the balance then due him in future payments of monthly installments up to a certain amount therein stated, and the balance when the roof of the building was on.

Opinion of the Court, per PECKHAM, J.

Being without consideration, and the money being then due, the agreement to wait for several months for its payment was of no validity. But, although not valid, the plaintiff's decedent did, nevertheless, wait some time before commencing the action, although the defendants neglected to pay the balance spoken of in the paper at the times therein mentioned or at all.

It is true the action was commenced before the roof was on. But it was not commenced until after the breach on the part of the defendants of their agreement to pay as stated in the paper. It formed no bar to the prosecution of this action.

There is no contradictory evidence in regard to the amount which has been paid by the defendants, and the recovery, on the part of the plaintiff, is in accordance with the statement contained in the paper as to the amount which was due at the time it was signed.

Evidence was also given, on the part of the plaintiff under defendants' objection, that the value of the services of the architect was very much larger than the agreement he testified to. The recovery is, however, in accordance with the amount acknowledged in the paper to have been then due. So that in no event have the defendants been injured by the manner in which the cause of action was stated in the complaint or in which the trial was conducted.

Holding that this paper is not such a contract as is claimed on the part of the defendants' counsel, and that it, in substance, is simply a statement of the amount due for work already performed by the plaintiff's decedent, and a promise to pay it by defendants, all the other questions which were argued by the defendants' counsel, and which hinged upon the paper being a contract of the nature stated, become immaterial.

We think that the trial was conducted with eminent fairness by the referee, so far as this record shows, and that no errors were committed by him to the prejudice of the defendants.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

Statement of case.

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THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF
NEW YORK, Respondent, v. ERASTUS CRAWFORD et al.,
Appellants.

Mechanics' Liens having been filed pursuant to the act of 1878 (Chap. 315, Laws of 1879), upon a balance unpaid by the city of New York on a contract with V. for the building of a school-house for the city, and notices of the pendency of actions to foreclose said liens having been served, the city paid over the balance to the contractor upon receiving a bond conditioned that the obligors would save the city harmless from "any judgments, costs, damages, claims, or recoveries in said above-named actions," and would pay any judgment against the city recovered in any such action. In an action upon the bond, it appeared that said actions were consolidated and a judgment was recovered establishing the amounts of the respective liens and directing the city to pay the same out of the contract balance in its possession, "or secured to be paid to it by the bond referred to," but declaring that no personal judgment was given against the city. *Held*, that the debts due the lienors became, by force of the statute a positive incumbrance upon the balance, and made the lienors creditors of the city in lieu of the contractor, and subrogated them to his right of recovery; that the judgment rendered was within the condition of the bond, as the city was bound to pay it to the extent of its liability to the contractor, and the statute authorized its enforcement by execution; that the provision of the judgment against a personal judgment did not nullify or render incapable of enforcement the judgment actually rendered.

The lienors' judgment was subsequently amended by striking out the clause as to a personal judgment and inserting instead a provision giving such a judgment and authorizing execution against the city. *Held*, that the amendment in no respect enlarged or changed the contract of the sureties or affected their liability, and so was no defense.

(Argued November 26, 1888; decided January 15, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made January 16, 1888, which affirmed a judgment in favor of plaintiff entered upon a verdict directed by the court.

This action was against the sureties upon a bond of indemnity executed by Peter J. Vanderbilt as principal and the defendants as sureties.

Statement of case.

The recitals and condition of the bond are as follows :

" *Whereas*, The board of education of the city of New York, did, on the 18th day of July, A. D., 1879, enter into a contract with one Peter J. Vanderbilt of the city and county of New York, for the erection, in part, of a school-house at the north-westerly corner of Lexington avenue and One Hundred and Fifth street, in the said city of New York, at and for the sum of \$30,977, to be paid in cash to said Vanderbilt, in twelve installments, as in said contract expressed ; and,

" *Whereas*, There is now due and to grow due, to the said Vanderbilt under the said contract, the sum of fourteen thousand four hundred and seventy-seven dollars (\$14,477), to wit., the five last installments in said contract specified ; and,

" *Whereas*, Certain persons assuming to act under and in pursuance of chapter 315 of the Laws of 1878, have filed notices of lien or claims, as against said last mentioned sum of \$14,477, with certain notices of the pendency of actions to enforce said liens :

" The condition of this obligation is such that if the above named and bounden Peter J. Vanderbilt, Erastus Crawford and Alfred W. Budlong, or either of them, shall save and keep harmless the said mayor, aldermen and commonalty of the city of New York, and the board of education, and the board of school trustees in the twelfth ward in such city, of and from any judgments, costs, damages, claims or recovery in said above named actions, or any of them, and shall well and truly pay any judgment that may be recovered in said actions, or any of them, against the mayor, aldermen and commonalty of the city of New York, or the said board of education, or said board of school trustees, then the above obligation to be void ; otherwise to remain in full force and virtue."

After this bond was executed and delivered to the city, it paid to Vanderbilt the entire balance remaining unpaid to him at the time of the execution and delivery of the bond.

The actions in favor of the persons filing the notices of liens to foreclose the same were consolidated and judgments

Statement of case.

were recovered in their favor against the administratrix of Vanderbilt, who had died after the time when all said payments had been made to him. The conclusion of the referee before whom the actions were tried as one suit was that these persons were "entitled to recover judgment against the said Jane Vanderbilt, as administratrix, etc., and the mayor, aldermen and commonalty of the city of New York, for the amounts severally found due them in the findings of fact, with interest from January 1, 1881, and costs."

Upon this report a judgment was entered in the Court of Common Pleas in which the proceedings were prosecuted, directing that the said sums so ordered to be paid by the city as specified, were to be paid out of the moneys earned under the contract, and which moneys it was stated "are in the possession of the mayor, aldermen and commonalty of the city of New York, or secured to be paid to it by the bond referred to."

Then followed this provision: "And it is further adjudged and decreed that no personal judgment is given in favor of either of the plaintiffs or lienors against the defendants, the mayor, aldermen and commonalty of the city of New York, the trustees of public schools of the twelfth ward of the city of New York, and Stephen A. Walker, as president of the board of education of the city of New York." An appeal was taken from the judgment to the General Term of the Court of Common Pleas, where it was affirmed, with costs to the several parties, and from that judgment it was appealed to the Court of Appeals, where it was in like manner affirmed. After this affirmance an application was made to strike out the last paragraph of the judgment, and to insert in its place a paragraph declaring that the several persons to whom the sums of money were directed to be paid should recover judgment for such sums respectively, and should have execution for them against the property of the mayor, aldermen and commonalty of the city of New York, and an order was made providing for this change in the form of the judgment.

Further facts appear in the opinion.

Opinion of the Court, per FINCH, J.

T. Mitchell Tyng for appellants. The plaintiffs cannot recover in this action, because the averment of the complaint that the judgment of March 26, 1885, as recovered and originally entered, was "a personal judgment" against the mayor, etc., of New York, the payment of which could be enforced by execution against the property of the corporation; and that because such an execution could be lawfully issued, the corporation was compelled to pay the judgment, was not proved. (*Connor v. Reeves*, 103 N. Y. 527.) Under the circumstances, while the corporation held this fund of \$14,477 in its treasury, it was simply as trustee for the lienors and the contractor. (*People ex rel. Dannat v. Comptroller*, 77 N. Y. 45; *Poppenhusen v. Seeley*, 3 Abb. Ct. App. Dec. 615.) The liability of the defendants is *strictissimi juris*; it cannot be extended beyond the express terms of their contract. (*Ward v. Stahl*, 81 N. Y. 406; *National Bk. v. Conklin*, 90 id. 110; *Thompson v. McGregor*, 81 id. 592.) The judgment entered March 26, 1885, was purely a judgment *in rem*, which reached this fund of \$14,477 and nothing else. (*Mittnacht v. Kellerman*, Daily Reg., May 17, 1887; *Gerould v. Wilson*, 81 N. Y. 573; *Stevens v. Mayor, etc.*, 84 id. 296; *Saltus v. Genin*, 3 Bosw. 250; *Barnes v. Quigley*, 59 N. Y. 265.) The alteration of the judgment of March 26, 1885, effected as it was, discharged the defendants from all liability to the plaintiffs under their bond. (*Bangs v. Strong*, 7 Hill, 250; *Grant v. Smith*, 46 N. Y. 93; *Calvo v. Davies*, 73 id. 211; *Paine v. Jones*, 76 id. 274.)

D. J. Dean for respondent. The validity of the judgments paid has been confirmed by the Court of Appeals. (*Bell v. Mayor, etc.*, 105 N. Y. 141.)

FINCH, J. This action was brought upon a bond of indemnity, and resulted in a recovery against the sureties which they seek to reverse on this appeal. The city was building a school-house, for the construction of which they had contracted with one Peter J. Vanderbilt, agreeing to pay

Opinion of the Court, per FINCH, J.

him something over \$30,000, in twelve specified installments. At the date of the bond there was a balance of over \$14,000, due and to become due, to the contractor, but its payment by the city had been made perilous by the filing of mechanics' liens, under chapter 315 of the Laws of 1878, and notices of the pendency of actions to foreclose those liens. Their effect upon the city was manifest. Under the law, payment to the contractor was to be withheld, and the sums due him retained to meet the emergency of a recovery by the lienors, and a diversion to them of the sums due to the contractor; or, payment was to be made to him at a risk, on the part of the city, of a liability to pay a second time to the lienors the sums already paid to the contractor. The extent of that risk is apparent from the terms of the statute. The debts due the lienors became a positive incumbrance upon the balance due and to become due to the contractor, and made the lienors creditors of the city in the room and stead of the contractor himself, and subrogated them to his right of payment and recovery. The lien was upon a specific fund only in the sense that it could not exceed the balance due, but that balance was in the city treasury, and separated from other moneys only by the appropriations. It was thus a lien upon the debt or liability of the city due to the contractor, and the necessary effect of the lien when foreclosed was to make the city debtor to the lienors to the extent of the balance earned and unpaid.

In this situation of affairs the bond sued on was given and the facts thus far stated are derived from its recitals and the terms of the statute. The sureties covenanted to protect the city from "any judgment, costs, damages, claims or recovery" in the actions prosecuted by the lienors, and to pay any judgment that might be recovered against the city. Upon the execution of this bond the city paid the contractor as if no liens had been filed. It is obvious that the purpose of the bond was to induce that payment and protect the city against its consequences. The actions of the lienors went to judgment. The validity and amount of their liens were established. The judgment entered directed the city to pay the respective

Opinion of the Court, per FINCH, J.

amounts out of the contract balance in its possession or secured to be paid to it by the bond of indemnity, and was within the precise terms of the sureties' covenant; for that was not merely to pay a judgment recovered against the city, but to save it harmless from any judgment, damages, costs or recovery in the actions prosecuted by the lienors. Such a recovery had been obtained; the city was bound to pay it; the statute authorized its enforcement by execution; and while the judgment entered provided that no personal judgment was rendered against the city, that could mean only a general judgment irrespective of the amount of the balance and of the debt due to the contractor, and could not nullify or render incapable of enforcement the judgment actually rendered which required the city to pay to the extent of its liability to the contractor.

It cannot be maintained, therefore, either that the judgment recovered by the lienors could not be enforced against the city, nor that it was not within the terms of the bond.

The subsequent amendment of the judgment was rather formal than material, and, in no respect, enlarged or changed the liability of the sureties. That amendment did not touch or alter the terms of their contract. Those remained the same in all respects unchanged, and, without the amendment, the city would have been compelled to pay the lienors and the sureties to reimburse the city.

The argument of the appellants to the contrary necessarily nullifies the statute of 1878, and makes the giving of the bond little better than an absurdity. That argument is that under the statute the lien was upon the specific fund and execution could seize that alone, and since the city did not have it, because it had been paid to the contractor, there was nothing which the lienors could seize until the city repossessed itself of the money paid to the contractor. The city could only do that, if at all, by a suit against the contractor, and if he had nothing, would get nothing, and be liable to the lienors only for what it got. Thus the whole protection of the statute dwindles to a mere personal judgment against the contractor, which the lienors could have had without the singular inter-

Statement of case.

vention of the statute, and the bond was idle and needless, for the city could pay with impunity and be liable to the lienors only in the event that it succeeded in getting the fund back from the contractor. No such construction is possible. The liability of the city to the lienors, whatever it may have done with the fund, is the very pith of the statutory protection, and to answer to the city for that liability was the exact purpose of the bond.

The question as to the extent of the recovery was not raised in such a manner as to be open to our review.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

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111 644
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WILLIAM H. HOLLISTER, Appellant and Respondent, v. JOHN
A. STEWART et al., Appellants and Respondents.

111 644
170 1258

The trustees named in a railroad mortgage have no right, as against and without the consent of the holder of bonds secured by the mortgage, and in the absence of provisions therein authorizing it, to waive and condone defaults in the payment of principal or interest on his bonds or to assent to and recognize a new mortgage given priority over his.

The W. C. R. R. Co., for the purpose of obtaining means with which to construct its road, issued bonds secured by a mortgage covering its line, rolling-stock and other property, including a land grant given it by the United States government. By the mortgage it was made the duty of the trustees named therein in case of default in any payment of principal or interest on the bonds to apply the mortgaged property "promptly to that purpose." The company, with the approval of the trustees, was authorized to sell the lands covered by the land grant, accept the mortgage bonds in payment or hold the proceeds of sales as a sinking fund for payment of the bonds. Interest on the bonds was to be paid by the company, and it was provided that none of such proceeds were to be appropriated to the payment of interest unless the treasury of the company should be first exhausted, in which case the proceeds might be used to pay accrued interest, the company to execute to the trustees "income bonds" therefor, to be first paid out of the earnings of the road and secured by a second mortgage. In case of default in the payment of interest on the first mortgage bonds, the whole principal became due at the option of the trustees, and they were authorized to enter

Statement of case.

upon the granted lands, to take possession of the railroad and rolling-stock and to sell the whole property and apply the net proceeds ratably to the payment of unpaid bonds and interest. By article thirteen of the mortgage the company was required, in case of such default, to execute such further deeds and assurances as were needed and to furnish a full inventory, etc. By a subsequent article the trustees were required, on the requisition of the holders of not less than one-fourth of the bonds, to exercise their power of entry, or sale or both. If a default was made in the omission of anything required by said article "for the further assuring of the title of the trustees, * * * or in any provisions herein contained to be performed or kept by said company" the trustees were given a discretion "to enforce or waive the rights of the bondholders by reason of such default," subject to a power in a majority in amount of the bondholders to instruct the said trustees to waive such default, but it was declared that no action of the said trustees or bondholders, or both, in waiving such default, should extend to or be taken to affect any subsequent default. *Held*, that the trustees had no discretion to waive a default in the payment of principal or interest; that the words "or in any provisions," etc., were to be construed to relate to the provisions other than those already specifically provided for.

The corporation entered into a contract for constructing its road, by which it agreed that the contractors should receive in payment for the construction the whole issue of first mortgage bonds, all of the stock and the earnings of the road during the period of construction. The contractors were to procure the necessary funds by sale of these securities and were to buy up the interest coupons as they matured. The contractors proceeded with the work, sold bonds and took up maturing coupons, but while the road was incomplete, not having funds to meet interest amounting to over \$150,000 about to mature, by an arrangement between the company, the contractors and the trustees, proceeds of the land grant sales to the amount of the coupons so taken up were assigned by the trustees, they taking from the company as security an "income bond" conditioned to pay the amount, with interest, out of the earnings of the road. The company or the contractors then borrowed the money to take up maturing interest coupons, the company giving as security "land income notes" with the sinking fund securities, which were so assigned, pledged as collateral. To procure money to complete the road the company increased its land income notes to \$300,000. Another default in interest having occurred, the trustees began a foreclosure suit, and under authority of the mortgage, took possession of the road and began to operate it, and thereafter joined with a majority of the bondholders in and adopted a plan for reorganization. This contemplated the substitution of three mortgages for the first mortgage, one of these for \$400,000, which, with the accompanying bonds, was given to secure the land income notes, and interest on certain unfunded coupons; this was made a first lien

Statement of case.

on all of the property of the company. The trustees assumed to waive all previous or future defaults in payments of principal or interest on the first mortgage bonds; they thereafter applied some part of the proceeds of the land fund to payments of principal and interest on the new preferred mortgage bonds. In an action brought by plaintiff, who held bonds secured by the first mortgage and who had not assented to the reorganization scheme or to the waiver of defaults, against said trustees, a judgment was rendered compelling them to pay the proceeds of the land sales in ratable proportions upon plaintiff's bonds and adjudging the new mortgages to be void as to him. *Held*, no error; that the scheme of reorganization could only be made effective by consent of all the original bondholders or by a foreclosure cutting off their lien; that plaintiff had a right to stand upon his contract and the trustees had no power to compel him to make a new and different one.

C. S. R. Co. v. Gebhard (109 U. S. 527) distinguished.

By the fourth article of the mortgage, securing the bonds, it was provided that "during the construction of the said railroad hereby mortgaged, the interest on the bonds * * * shall be paid out of all the earnings of the said road and the proceeds of sales of the first mortgage bonds," and as by their contract the contractors were to receive in payment for construction the whole issue of first mortgage bonds, and the earnings of the road during construction; *held*, that the coupons taken up by them were extinguished as obligations and could not form the basis of a claim by them against the company. (GRAY, J.; DANFORTH and PECKHAM, JJ., concurring.)

The first mortgage contained a provision that neither of the trustees "shall be answerable except for his own willful default or neglect." The trial court found that defendants, although acting erroneously, proceeded in good faith. Plaintiff claimed that the bonds of those who assented to the reorganization should be considered as extinguished, and that all the proceeds of the land grant and income from earnings should be devoted to the payment of bonds held by the non-assenting owners. *Held*, that the omission to pay plaintiff had some excuse in his exorbitant claims, and that judgment was properly rendered against the trustees, as such, and not personally.

Also, *held*, that the holders of the new preferred bonds were not necessary parties; that the trustees and the company are all the parties necessary. The defense of a former suit pending, to be available, must be pleaded.

(Argued January 23, 1888; decided January 15, 1889.)

CROSS APPEALS from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 19, 1885, which modified, and affirmed as modified, a judgment in favor of plaintiff entered

Statement of case.

upon the report of a referee; also appeal by defendants from so much of said order as affirmed an order of Special Term denying a motion on the part of defendants to resettle the judgment.

This action was brought by plaintiff, as owner of certain bonds issued by defendant, the Wisconsin Central Railroad Company, secured by mortgage on all its property against the company and the trustees named in said mortgage, to restrain said trustees from taking certain proceedings which the complaint alleged they were about to take, which were in violation of their duty and plaintiff's rights, and for other equitable relief.

The facts, so far as material, are stated in the opinion.

Wheeler H. Peckham for plaintiff. The General Term erred in modifying the judgment by relieving the trustees from personal liability. When a trustee disposes of money in an unauthorized manner, he must replace it, and is personally liable. (*Atty.-Gen. v. Wilson*, 1 C. & P. 1-21; *Atty.-Gen. v. Dublin*, 1 Bligh. [N. S.] 312; *Atty.-Gen. v. Belfast*, 4 Irish Ch. 142-144; *Perry on Trusts*, §§ 927, 461, 761, 847; *Ackerman v. Emot*, 4 Barb. 626-645.) The General Term erred in reversing, and the referee was right in directing defendants to go on with the foreclosure suit of the first mortgage in Wisconsin. (*Perry on Trusts*, § 760; *In re Mechanics' Bk.*, 2 Barb. 446.) This court has jurisdiction of all trusts and of all trustees when it can get jurisdiction of their persons; and the rule in such case is the same as in other personal actions. Any number of suits may go on in different jurisdictions, but the first judgment obtained is conclusive, and may be given in evidence with conclusive effect in the other suits. (*Williams v. Ayrault*, 31 Barb. 364, 367, 368; *Trubee v. Alden*, 6 Hun, 78; *Osgood v. Maguire*, 61 Barb. 59; *Lorillard Co. v. Meshural*, 7 Robt. 309, 314; *Union Trust Co. v. Olmstead*, 102 N. Y. 729.)

D. S. Wegg for defendants. In a court of equity the indebtedness represented by the preferred bonds is of such a

Statement of case.

character as to entitle it to payment prior to complainant's claims. (*Jerome v. McCartee*, 94 U. S. 734; *Kennedy v. S. P. P. R. R. Co.*, 2 Dillon, 448; *Hoover v. M., etc., R. R. Co.*, 29 N. J. Eq. 4; *Stanton v. A., etc., R. R. Co.*, 2 Woods, 506; *Meyer v. Johnston*, 53 Ala. 237; *Coe v. N. J. M. R. Co.*, 27 N. J. Eq. 37; *In re U. S. R. S. Co.*, 55 How. Pr. 286; *Pierce v. Emery*, 32 N. H. 484-521.) The bonds and coupons in suit are non-negotiable, and all equities attaching to them in the hands of a prior owner bind the present holder. (*Little v. Phoenix Bk.*, 2 Hill, 425; 7 id. 357; *Pardee v. Fish*, 60 id. 265; *Lindsey v. McClelland*, 18 Wis. 481; *Freeman's Bk. v. Ruckman*, 16 Grat. 126; *Parsons v. Jackson*, 99 U. S. 434.) The preferred bonds should be first paid, as the mere change in form of the evidence of indebtedness did not, and could not, change its character or its rights to precedence over complainants' claim. (*Dunham v. Dey*, 15 Johns. 355; *Brinckerhoff v. Lansing*, 4 id. 64; *Watkins v. Hill*, 8 Pick. 522; *Davis v. Maynard*, 9 Mass. 242; *Pomeroy v. Rice*, 16 Pick. 22; *Chase v. Abbott*, 20 Iowa, 154; *Iowa v. Lake*, 17 id. 215; *Stevens v. M. H. R. R. Co.*, L. R., 8 Ch. Ap. 1064.) No preference should be allowed the plaintiff, and the complaint should be dismissed. *In re G. W. (Forest of Dean) C. Co.*, 21 L. R., Ch. Div. 769. *In re C. H. C. Co.*, L. R. Ch. Div. 259; *In re D. C. F. E. & T. Co. (Limited)*, *Canada*, 55 Ch. Div., L. T. Rep. [N. S.] 347; *Ames v. N. O. M. & T. R. R. Co.*, 2 Wood, 206.) Henry F. Spencer, trustee of the land income notes, was and is a necessary party to this litigation. (*Green v. Sisson*, 2 Curtis, 171; *Perry on Trusts*, § 881.) Under the terms of the trust deed the will of the majority must rule, and a disaffected two and one-half per cent cannot be heard to complain. (*In re C. R. Co.'s Scheme*, L. R., 3 Ch. App. 278; *C. S. R. Co. v. Gebhard*, 109 U. S. 527.) The court in this case should construe plaintiff's acceptance of benefits earned by the plan of reorganization as an implied assent to the plan, and should also hold him bound by the acts of the trustees under the very large discretionary powers vested in such

Statement of case.

trustees by the trust deed of 1871. (*Gilfillan v. U. C. Co.*, 109 U. S. 401; *Gates v. B., etc., R. R. Co.*, 1 The Reporter, 464; *Shaw v. R. R. Co.*, 100 U. S. 611; *Sturges v. Knapp*, 31 Vt. 57.) The parties who advanced moneys to save the trust estate, and whose equities are represented by preferred bonds, are entitled to a priority of payment. (*Noyes v. Blakeman*, 6 N. Y. 567; *Randall v. Dusenbury*, 39 N. Y. Super. Ct. 174; 63 N. Y. 645; *Stanton v. King*, 8 Hun, 4; *New v. Nicoll*, 73 N. Y. 127; *Perry v. Bd. of Missions*, 102 id. 99; *Burroughs v. Gaither*, 66 Md. 171; *U. T. Co. v. I. M. Co.*, 117 U. S. 434; *Jerome v. McCartee*, 94 id. 734.) The judgment should be reversed for want of necessary parties. (Culvert on Parties, 4, 13; Story's Eq. Pl. §§ 72, 75, 207; *Holland v. Baker*, 3 Hare, 68; *Hughes v. Eades*, 1 id. 486; *Gray v. Schenck*, 4 N. Y. 460; *Peafold v. Nunn*, 5 Sim. 405; *Weatherby v. St. Giorgio*, 2 Hare, 624; *Newton v. Egmont*, 5 Sim. 130; *Milligan v. Mitchell*, 1 M. & C. 433; 1 Daniel's Ch. Pr. 287; *Hoe v. Wilson*, 9 Wall. 501; *Hickock v. Scribner*, 3 Johns. Cas. 311; *Coiron v. Millandon*, 19 How. [U. S.] 113, 115; *Hill v. Proctor*, 10 W. Va. 59, 78; *Shaver v. Brainard*, 29 Barb. 27; *Davis v. Mayor, etc.*, 2 Duer, 633; *S. C.*, 14 N. Y. 521; *Penn v. Hayward*, 14 Ohio St. 302, 306; *Sherman v. Parish*, 53 id. 483, 490; *Osterhoudt v. Taxpayers*, 98 id. 239; *Richards v. Richards*, 9 Gray, 313, 315; *Greenwood v. Atkinson*, 5 Sim. 419; *Holland v. Baker*, 3 Hare, 68; *Jesse v. Bennett*, 6 DeG., M. & G. 609; *Williams v. Allen*, 29 Beav. 292; *Camp v. McGillicuddy*, 10 Iowa, 201; *Forepaugh v. Appold*, 17 B. Mon. 625; *Sturtevant v. Brewer*, 17 How. Pr. 571; *Phillipson v. Gatty*, 6 Hare, 26; 9 Abb. Pr. 414; *Perry v. Knott*, 4 Beav. 179; *Minn. v. Staut*, 15 id. 49; *Carlisle v. R. R. Co.*, 1 Mac N. & G. 689, 698; *Cassidy v. Shimmin*, 122 Mass. 406, 411; *Hubbard v. Eames*, 22 Barb. 597, 602, 605; *Williamson v. Field*, 2 Saw. Ch. 533, 562; *Read v. Prest.*, 1 Kay & Johns. 183; *Payne v. Parker*, L. R., 1 Ch. App. 327; *Hammond v. Walker*, 3 Jur. [N. S.] 686; *Browne*

Opinion of the Court, per FINCH, J.

v. *Blount*, 2 R. & My. 83; *Chipman v. Montgomery*, 63 N. Y. 221, 232; *Stevens v. M. H. R. R. Co.*, L. R., 8 Ch. App. 1069.)

William A. W. Stewart for defendants. The injunction restraining the defendant trustees from making payments on the preferred bonds should be vacated, the plaintiff being in the wrong forum to obtain such relief. (*Stern v. W. C. R. R. Co.*, 1 Fed. Rep. 555; *Owens v. O. C. R. R. Co.*, 20 id. 10; *U. T. Co. v. R. R. R. Co.*, 6 Biss. 197; *Buck v. Colbath*, 3 Wall. 341; *Riggs v. Johnson Co.*, 6 id. 166; *Levy v. Col. L. Ins. Co.*, 1 Fed. Rep. 206.) Plaintiff is equitably entitled to just as much income and security as he would have received had the reorganization plan never been devised, and the preferred bonds, to the issuance of which he did not assent, had never been issued, and he is further entitled, *pro rata* with all other bonds secured by the first mortgage, to the profits and benefits of the property in the possession and management of the trustees. (*Ketchum v. Duncan*, 96 U. S. 659; *Stevens v. N. Y. & O. M. R. R. Co.*, 13 Blatchf. 412; *Virginia v. C. & O. C. Co.*, 32 Md. 501; *Perry v. Bd. of Missions*, 102 N. Y. 99.) The proof and judgment must conform to the complaint in a suit in equity as well as in an action at law. (*Stevens v. Mayor, etc.*, 84 N. Y. 296; *Southwick v. First Nat. Bk.*, 84 id. 420; *Wintermute v. Cook*, 73 id. 107.) If plaintiff really wishes foreclosure, let him apply for leave to intervene in the action pending in the United States Circuit Court, and if he can satisfy that court that the trustees have improperly refused to adopt the policy of foreclosure, he can obtain a judgment of foreclosure and sale. (*Alexander v. C. R. R. Co.*, 3 Dillon, 487; *Jones on R. R. Securities*, § 436.)

FINCH, J. On the first argument of this case I read the following opinion, omitting only a portion of the argument as to jurisdiction, which I deem it unnecessary to repeat. Upon the reargument I am contented to stand upon it, and hand it down now as the ground of my vote for affirmance. That opinion was as follows:

The action of the trustees to whom the first mortgage of the

Opinion of the Court, per FINCH, J.

Wisconsin Central Railroad Company was given, and who by that instrument were charged with certain duties, and intrusted with important powers for the benefit and protection of the bondholders secured by its lien, has been adjudged not in accordance with the trust, although not a willful departure therefrom, and they have been required to furnish indemnity for the past and properly perform the trusts in the future.

Both sides appeal; the trustees upon the ground that they have in no just sense or respect violated their duty, but have acted in all things within their powers and wisely for the interest of those whom they were bound to protect, and the plaintiff, who holds bonds secured by the mortgage to the amount of two hundred thousand dollars, because the General Term modified the judgment by relieving the trustees from personal liability, and from the command to prosecute the foreclosure of the mortgage, already commenced, to an ultimate sale and distribution. To obtain a safe foundation for our judgment, it thus becomes necessary to examine fully the provisions of the mortgage, since the authority of the trustees has no other source, and their duty no other measure.

That mortgage, given for something over eight millions of dollars, was executed by the company substantially for the purpose of obtaining the means with which to construct its road. The security covered not only the line with its rolling stock and stations and other and usual property, but also a valuable land grant, given by the general government to aid in the completion of the enterprise, and conditioned upon its progress toward that completion. All this property, by article second of the mortgage, is pledged to the payment of the interest and principal of the bonds, and it is made the duty of the trustees to apply the same "promptly to that purpose," "in case of default in any such payment" by the mortgagor.

But this incumbrance, covering the land grant earned by the corporation, and intended to be utilized by sales as purchasers could be obtained, involved the necessity of an authority in the trustees to release the lands from the lien when the sales were effected. Accordingly, article third authorized the

Opinion of the Court, per FINCH, J.

corporation, with the approval of the trustees, to contract for the sale of such lands for cash or on credit, and accept any of the bonds with their matured coupons at par in payment; but required that all the proceeds of every such sale, "whether in cash, bonds, coupons or other securities," should be deposited with the trustees, and proper releases be given by them to the purchasers. The proceeds of the lands thus became substituted for the lands themselves, and continued subject to the mortgage lien. Out of these proceeds a sinking fund was established for the payment and redemption of the bonds. The trustees were directed to invest such proceeds in the first mortgage bonds of the company whenever they could be purchased at not exceeding par and accrued interest, but the trustees were not to hold the bonds and coupons which thus came into their hands as living obligations against the company, for, whether obtained by purchase with the proceeds of sales, or taken as cash in payment for the lands, the trustees were required to cancel them every three months and surrender them to the company as paid. In other words, the authority was to pay the bonds out of proceeds, but not to buy and hold them against the obligors, or mortgage such proceeds for other purposes. As to any proceeds which could not be so appropriated because bonus could not be obtained at par, further provisions were made for their investment, specifying the classes of securities, and reserving some choice and discretion in that respect to the company.

By article fourth additional strength and protection was given to the sinking fund through a provision relieving it from the payment of interest on the bonds during the progress of construction except in one emergency. That interest was to be paid by the company, and none of the land proceeds were at any time to "be appropriated to the payment of interest on said bonds" unless the treasury of the company should be first exhausted. In that event the sinking fund was permitted to pay accrued interest; not, as we have said, to buy or secure coupons, but to pay and discharge them — and since in so doing the land fund would be bearing the burden

contracted to be borne by the company, such reimbursement as seemed reasonably possible was ordered to be made. For all such payments of interest made out of the sinking fund in the prescribed emergency the company was to give to the trustees income bonds to be first paid out of earnings before any dividend to stockholders. These bonds were to draw interest at seven per cent, and were to "be redeemed by other bonds of the company bearing the same rate of interest in gold and secured by a second mortgage" if the company should determine to issue such bonds.

The mortgage then regulated the duties of the trustees in case of default. If such default in the payment of interest continued for six months, the whole principal became due at the option of the trustees, and they were authorized to enter upon and sell the granted lands at public auction; to enter upon and take possession of the railroad and its rolling stock; to operate and manage the line and apply any surplus over expenses and necessary repairs and improvements to the payment of interest upon the first mortgage bonds "in the order in which such interest shall have become or shall become due, ratably to the persons entitled to such interest;" but if the default should continue for a year, then the trustees were authorized to sell the whole of the property, or so much as might be necessary, and apply the net proceeds "to the payment of the principal of such of the aforesaid bonds as may be at that time unpaid, whether or not the same shall have previously come due, and of the interest which shall at that time have accrued on the said principal and be unpaid without discrimination or preference, but ratably to the aggregate amount of such unpaid principal and accrued and unpaid interest."

Article 13 required the company to execute such further deeds and assurances as might be needed, and to furnish a full inventory of all the movable property of the company.

Article 16, about which there is serious dispute over its scope and meaning, deals again with the emergency of a default, and makes it the duty of the trustees to exercise their

power of entry or power of sale, or both, or take appropriate legal proceedings to enforce the mortgage in manner following : If the default is in the payment of interest or principal of the bonds, then, upon the requisition of the "holder of not less than twenty-five per cent of the aggregate amount of said bonds," accompanied by a proper indemnification by the persons making the same against the costs and expenses to be incurred ; but, the instrument proceeds, "if the default be in the omission of any act or thing required by article 12 of these presents for the further assuring of the title of the trustees to any property or franchises now possessed or hereafter acquired, or in any provisions herein contained to be performed or kept by said company, then, and in either of such cases, the requisitions shall be as aforesaid ; but it shall be within the discretion of the trustees to enforce or waive the rights of the bondholders by reason of such default, subject to the power hereby declared of a majority in interest of the holders of said bonds, by requisition in writing or by a vote at a meeting duly held, to instruct the said trustees to waive such default, or to enforce their rights by reason thereof, provided that no action of the said trustees or bondholders, or both, in waiving such default or otherwise shall extend to or be taken to *effect* any subsequent default, or to impair the rights resulting therefrom." It is substantially conceded, as, indeed, is quite apparent, that the word "effect" should be read "affect," and that the reference to article 12 should be to article 13, which contains the provisions for further assurance which are referred to, and which identify the article intended.

It is now said, on behalf of the trustees, that this provision gave them a discretion to waive a default in the payment of interest or principal of the bonds, subject only to be controlled by the requisition or vote of a majority in interest of the bondholders. We do not accede to that construction. Provision had just been made, in a preceding paragraph, for the emergency of a default in principal or interest, which imposed the duty of proceeding upon the default on the requisition of twenty-five per cent in interest of the bondholders. That

Opinion of the Court, per FINCH, J.

gives no discretion to the trustees, but imposes an imperative duty. The following subdivision, entirely different in its terms, relates to another and distinct default, less serious in its consequences, and not of such vital importance, as to which a discretion was given which might be controlled by a majority in interest. By its very language it relates to a default in the covenants for further assurance in article 13; and its added words, "or in any provisions herein contained to be performed or kept by said company," although very general and broad, must be construed to relate to the provisions other than those already provided for by different and more stringent directions. It is easy to see that discretion to waive a default, sustained by a majority in interest of the bondholders, might prudently and safely be given to the trustees as to covenants for assurance and to furnish an inventory and the like, while it is scarcely possible to suppose that the enormous discretion of waiving every default of interest or principal was intended to be conferred. Stockholders of the company buying a trifling excess over half of the bonds could, with the aid of the trustees, practically annul and cancel the whole debt, and take to themselves the entire net earnings of the company. We are confident that the language of the subdivision, taken exactly as it stands in the record, does not refer to a default in principal or interest, but relates wholly to the other covenants to be kept and performed by the mortgagor.

The mortgage contained a further provision, important to be considered in reaching a determination of the appeal, that neither of the trustees "shall be answerable except for his own willful default or misconduct."

Having thus ascertained the authority and duty of the trustees, it becomes necessary to get as clear and definite a view of what they did as can be gathered from the record. And this can only be done by taking also into view the precedent and concurrent action of the railroad corporation itself.

The mortgage was executed on the 1st day of July, 1871. The company seems at once to have abdicated all its functions beyond merely retaining its corporate existence, for it agreed

Opinion of the Court, per FINCH, J.

with contractors, who engaged to build the road, to give them the whole issue of bonds not exceeding \$25,000 a mile, which was the maximum limit of issue, and the whole of the stock and all the earnings of the road during the period of the construction, as a consideration for such construction. The contractors were to procure the necessary money by sale of these securities, and were to advance funds and buy up the coupons as they matured and possibly retain them as against the company.

They proceeded with their work; they sold the bonds and bought the maturing coupons, and continued this process until their debt, represented by such coupons, amounted to something more than half a million of dollars. Parallel with this accumulating debt the land fund in the hands of the trustees was being filled by the sales of lands, the proceeds of which, in the form of cash, contracts, mortgages and the like, reached what is called a large sum, but which the record does not disclose.

In this condition of affairs, and while the road was incomplete, and in December, 1874, it became apparent that the contractors were about to fail of performance, and could not continue to furnish funds for the purchase of coupons. Interest amounting to something over \$150,000 was about to mature, and the company's treasury was exhausted. Indeed, there had never been either treasury or treasure. To meet this emergency the land fund was the sole resource, and was called upon, as by the terms of the mortgage was permitted. What then occurred is involved in so much of confusion and uncertainty from want of details that, to avoid mistakes, we take the facts from defendants' brief. It declares that "the contractors, prior to January 1, 1875, had bought up and held as unpaid as against the company \$534,869.25 of coupons. To induce and enable the contractors to buy up the coupons maturing January 1, 1875, the land proceeds to the amount of \$534,869.25 were assigned and *paid* to the contractors." If that be true, the over-due coupons were paid and extinguished and the transfer canceled the debt. So far there is no hint that the assignment was collateral, and the trustees got no power

Opinion of the Court, per FINCH, J.

from the mortgage to do anything but pay. Yet the brief of the learned counsel adds, "and then all the land proceeds and over-due coupons were delivered by the contractors over to Henry F. Spencer, trustee, as collateral for the sums advanced for January, 1875, interest." That would seem to indicate that the coupons were not paid and the assignment was collateral. This is confirmed by the testimony of Mr. Abbot, who, when speaking of the over-due coupons held by the contractors, said, the assignment to Spencer was "for the *gradual* redemption and payment of *these* over-due coupons," and adds, "the whole mass of the over-due coupons and of these proceeds of land sales was then declared by Spencer, trustee, to be held by him as collateral security for the sums of money advanced in the purchase of the January 1, 1875, coupons." If that be true, the contractors' coupons were not paid. They were simply secured, and the debt and its collateral were used to procure a loan with which not to pay, but to buy, the maturing interest coupons. The transfer by the trustees was probably, in substance, an advance to the railroad company, which may have transferred it to the contractors, who pledged it to Henry F. Spencer, as trustee, and, with the proceeds, bought the maturing coupons. In the whole process we fail to see that any interest was actually paid. The mortgage trustees took back from the company as security for the advance what is called an income bond. That instrument was drawn in a penalty of one million of dollars, and was conditioned to pay back the advance on or before the 1st day of January, 1901, with interest at seven per cent out of the earnings of the road; to pay the accrued interest on such advances after the completion of the road from the net income remaining after payment of interest on the first mortgage bonds; and to give a second mortgage for the debt if it should so determine. The company, of the contractors, then borrowed the sum needed to buy or pay the maturing interest, the company giving as security what are termed its "land income notes." These drew interest at twelve per cent, were to be countersigned by

Opinion of the Court, per FINCH, J.

Spencer as "trustee of the series," were payable in six years, and pledged, as collateral, the whole fund in the hands of Spencer. I assume that with this loan the coupons immediately maturing were either bought by the contractors or paid by the company. But the road was still incomplete and more money was needed for that, and one of the consequences of the disregard by the trustees of the mortgage conditions was soon manifested. The company, to obtain such money, increased the amount of their land income notes to \$300,000, using the increase to complete the road, which the contractors were bound to finish. I discover no other charge beyond these notes imposed on the Spencer trust. But these measures did not avail. In July, 1875, there was another default in the payment of interest, and in December of that year the trustees began a suit in foreclosure. We must assume that they were requested so to do by twenty-five per cent in interest of the bondholders, and that the proper indemnity was given or waived. Thereafter the trustees, under the authority of the mortgage solely, and without judicial intervention, took possession of the railroad and began to operate it, and eventually joined with the bondholders outside of the plaintiff and a few others in a plan of reorganization that contemplated the substitution of three mortgages for the first mortgage and some other obligations of the company. One of these mortgages for \$400,000 was made a first lien on all the property of the company. The other two were framed for a reduced rate of interest. To this plan the plaintiff never assented, but the trustees adopted it, assumed to waive all existing defaults under the first mortgage, and agreed to waive them in the future; applied some part of the proceeds of the land fund to payments of interest and principal of the new preferred mortgage; and notified the plaintiff that they should pay such proceeds indiscriminately upon the new bonds as well as the old. Before this action was commenced they had paid on the preferred mortgage almost \$80,000, ignoring the plaintiff and paying him nothing; and when, after the commencement of the action, they began payments

Opinion of the Court, per FINCH, J.

to him, these were not made in accordance with his rights, but as if he assented to the reorganization scheme which he steadily repudiated. It is conceded that the trustees have on hand, as proceeds of land sales applicable to the purposes of the sinking fund, \$100,000, with which they propose to buy preferred or first or second series bonds issued under the reorganization scheme.

The Special Term prohibited that action, and declared the new bonds utterly void as against the plaintiff. The General Term concurred in that result, and, on defendants' appeal, we are to determine whether that decision is right.

It is first met on the part of the defendants by a protest against any exercise of the jurisdiction of the court founded upon the alleged fact of the pendency of the foreclosure suit, with its supplemental bill in the Federal court in Wisconsin.

No such defense was pleaded. The plaintiff came to trial without warning or preparation to meet any such issue. We have held, at the present term of the court, that a defense in equity that the court ought to refrain from the exercise of its conceded jurisdiction is never available unless pleaded, and where the answer is silent, amounts to a submission of the issues to the judgment of the court and a consent that upon those issues its judgment may be exercised. (*Town of Mentz v. Cook.*) * * *

The principal relief granted, and which the trustees on their appeal ask us to reverse, is a decree compelling them to pay the proceeds of the land sales in their hands, and such as they have misapplied in due and ratable proportion upon the plaintiff's bonds, and adjudging to be void as against him the new preferred mortgage and the two added securities. That is simply holding the parties to the conditions of the mortgage, and compelling the trustees to act in accordance with the terms of their trust. (The scheme of reorganization could only be made effective in one of two ways — by the consent of all the bondholders, or by a foreclosure cutting off their lien, and so enabling a new corporation to make its own mortgages in its own way. The plaintiff had a clear right to stand

Opinion of the Court, per FINCH, J.

upon his contract, and the trustees had no power or authority to compel him to make a new and different one. We are not concerned with his motives, but only with his rights. Without his consent, the company and the trustees, the other parties to the contract could not vary its terms and divert to new securities the funds pledged by the mortgage to its payment. The proposition is almost too plain for argument. Unless railroad syndicates or committees are to be put above the Constitution, the trustees cannot set aside and change their contract with plaintiff, of their own volition, without his consent. The authorities for any such right are necessarily either unsound or inapplicable; and an illustration of their lack of pertinency is found in *Canada Southern R. Co. v. Gebhard* (109 U. S. 527). In that case the scheme of reorganization, which modified and changed the contract rights of the bondholders, was authorized and legalized by a special enactment of the Dominion parliament, and the Federal court said of it that since no constitutional obligation prevented in that jurisdiction a destruction of the contract and a substitution of a new one, such legislation must prevail and govern the rights of the parties. But the court said, also: "In the absence of statutory authority, or some provision in the instrument which establishes the trust, nothing can be done by a majority, however large, which will bind a minority without their consent." Here the trustees are not a legislature, and if they were, would be checked by the Constitution, which permits no arbitrary tampering with contracts, and protects the rights thereby secured. The cases cited to show that this plaintiff was not entitled to any greater rights because of the reorganization scheme, show, also, that he was fully entitled to his original contract rights. In *Stevens v. M. II. R. Co.* (L. R., 8 Ch. App. 1064), the substance of the court's doctrine was embraced in the pithy sentence: "We ought to take care that his interests are not prejudiced by the scheme; but, on the other hand, it would be very wrong to hold that he has acquired by it a priority over every one else."

The trustees defendant had no right in the present case to

Opinion of the Court, per FINCH, J.

waive and condone defaults of principal and interest upon plaintiff's bonds; they had no right as against him to assent to and recognize a new mortgage given priority over his; they had no right to divert to that new security money applicable by the existing contract to the payment of his bonds. Theoretically, all this the trustees admitted.

In their letter of March 4, 1882, they explicitly promise not to apply any of the proceeds of the sinking fund otherwise than to the purchase and redemption of the first mortgage land grant bonds of said company. And in their answers they admit his right as a non-assenting bondholder to his due proportion of principal and interest upon his bonds out of the proceeds of the land grant; and yet they sought to reduce that due proportion by a prior application of more than \$100,000 upon the preferred mortgage.

(They endeavor to justify this in various ways. It was argued that since the scheme of reorganization was tantamount to and took the place of a distribution after foreclosure, and on such distribution a court of equity would prefer certain debts and obligations over the mortgage bonds, the trustees were justified in giving a similar preference, and the \$400,000 mortgage covered such claims and no others.) To this there are several answers. The trustees are not a court of equity and have no right to award preferences, least of all to anticipate what such a court, with the facts all before it, would or would not do.

But there is no preferred mortgage which has actually taken effect or superseded the original mortgage. The whole scheme of reorganization is *in nubibus*, and simply proposed and inchoate. The new mortgages are held in *escrow* and never yet have taken effect by delivery. On the contrary, the bondholders who have exchanged preserve their old bonds as unpaid and uncanceled and living obligations of the company, and upon them thus existing the land proceeds must be applied, and not upon a preferred mortgage held in *escrow* and which never may become operative through failure of the conditions of delivery

Opinion of the Court, per FINCH, J.

Nevertheless, let us discover, if we can, what indebtedness the preferred mortgage was intended to secure. The facts are in a state of unusual doubt and confusion. In a supplementary brief, the plaintiff's counsel points out five different statements or claims made in the record as the basis of that mortgage. The whole record is meager and confused and makes our steps perilous; but, as I have once already taken the facts from the defendant's brief, I shall assume now that the debts secured by the preferred mortgage are those stated in the formal scheme of reorganization which the trustees approved. It has been suggested that we ought to take it from the referee's report. But the defendants' answers are conclusive admissions. They, in terms, aver that the scheme the trustees approved and seek to carry out is that a copy of which is attached to their answer, and the referee himself finds and identifies that precise "plan." His description of it is very general, but not at all contradictory of its precise terms as admitted in the answers. We do not err, therefore, in relying upon that.

The first two items are the sum of \$71,218.15 for interest on unfunded coupons, under scheme of July 1, 1875, and the sum of \$24,000 to those who did not fund their coupons, but whose interest upon the certificates remains unpaid. This is an effort to secure for interest upon interest, a preference not only over coupons later maturing, but over the principal of the mortgage itself. Whatever else may be said about it, we may safely assume that it could have no such preference or priority.

The next item is for holders of land income notes, \$280,000. So far as these represent an expenditure for completing the road, which is about one-half of the total, it is not at all certain that any court would award a preference. In *Dunham v. C. P., etc., Railway Co.* (1 Wall. 254), a mortgage on the road built and to be built, was given its priority of lien upon a part thereafter constructed at the cost of the contractor and under an agreement that he should retain possession until paid. Our own views of such preferences have been recently

expressed (*Raht v. Averill*, 106 N. Y. 423); and we decided that the lien of a mortgage attaches not only to the land in the condition in which it was at the time of the execution, but as changed or improved by accretions or by labor expended upon it, while the mortgage was in existence; and creditors whose debts were created for money, labor or materials used in the improvement acquired no legal or equitable claim to displace or subordinate the lien of the mortgage for their protection.

So far as the income notes represented the \$150,000 of interest coupons which matured in 1875, and which the contractors bought, several suggestions occur to us. While it may be that the over-due coupons bought by the contractors before 1875, were purchases and not payments, because the then owner of plaintiff's bonds assented to the arrangement, no such fact is proven as to the purchase of 1875. As to those coupons there is not a word of evidence that those who accepted their money made or intended a sale. (*Union Trust Co. v. Monticello & P. J. R. R.*, 63 N. Y. 311.) Those coupons as against the bondholders must be regarded as paid. In *Ketchum v. Duncan* (96 U. S. 659), where modifying circumstances were shown and the transaction was regarded as a sale, there was yet a very formidable dissent.

But conceding that there was a sale, yet these coupons in the hands of the contractors were not entitled to any preference. (*Dunham v. Railway Co.*, *supra*.) They were bound by their contract to buy them, and as holders stood simply like the others. On the basis that the reorganization is meant to be the equivalent of a distribution on foreclosure, so as to open the question of equitable preferences by the court, and such "arrangement acts" are a species of "bankrupt acts" (*Can. Southern v. Gebhard*, *supra*, 535, 541), the mortgage explicitly forbids any such preference. The provision in article tenth of the mortgage for payment in the order of maturity relates apparently to the disposition of the earnings of the road and to a case not of ultimate distribution.

The final item going to make up the preferred mortgage is

Opinion of the Court, per FINCH, J.

an estimate of interest likely to accrue before settlement on the previous items.

We discover, therefore, no ground, legal or equitable, upon which the preferred mortgage can stand as against the plaintiff, and the judgment as modified by the General Term was right, unless those modifications, upon the plaintiff's appeal therefrom, should be deemed erroneous.

Our consideration of that subject has led us to the conclusion that those modifications should be sustained.

There is an express finding that the trustees, though acting erroneously, proceeded in good faith. It would be difficult to sustain that finding were it not for the fact that their omission to make payments upon plaintiff's bonds until after he had sued, has a reasonable explanation. He claimed more than was his right. He sought not only to defeat the effect of the reorganization upon his bonds, but to make that scheme the means of acquiring an undue preference for himself. He claimed to stand as if the whole assenting first mortgage bonds had been extinguished and the proceeds of the land grant and income from earnings were devoted to the few non-assenting bonds alone, and so sought payment in full by reason of the sacrifices of others. He failed in that effort deservedly, and the omission to pay had some excuse in his exorbitant claims and his hostile attitude. We are disposed, therefore, upon the finding of the referee, and the explicit provisions of the mortgage to approve of the ruling of the General Term that judgment should go against the trustees as such and not personally.

More doubt has attended our reflection upon the question of an order to continue the foreclosure, but the complaint is scarcely framed for such relief, and the proofs indicate that it might merely work mischief to one party without producing benefit to the other, and so we concur in the modification made in that respect.

The judgment of the General Term and the order denying the motion to correct and resettle the judgment, should be affirmed.

Opinion per GRAY, J.

GRAY, J. In this case, which is for the second time presented to the court upon reargument, I agree with Judge FINCH's opinion in holding that the General Term were right in modifying the judgment so that it should be against the trustees, as such, and not personally. As to the point raised by the defendants' counsel, that there was an absence of necessary parties, I do not think it is tenable and I agree with the views, in that respect, which were expressed in the opinion at General Term. The new preferred bonds represent the land income notes and the trustees being made defendants, with the Wisconsin Central Railroad Company, all the parties are before the court who are necessary to an adjudication upon the plaintiff's cause of action.

As to the objection raised by the defendants' counsel to the jurisdiction of the court below, I fully agree in the views expressed in Judge FINCH's opinion. To be available as a defense, it should have been alleged in the answer or suggested upon the trial. Neither course being taken, the parties must be deemed to have waived it and to have submitted themselves to the jurisdiction of the court. The cause of action was one cognizable in itself by the court; for it was based on an alleged violation by the trustees of their duty towards the plaintiff, as defined by the terms of the trust deed, and the issue formed was, in fact, as to what were the plaintiff's rights under a construction of the provisions of that instrument. Nor do I think that it is for this court to say, on appeal, the objection not being taken by pleading or motion in the trial court, that the trial court should, *ex proprio motu*, have dismissed the complaint.

As to the main question in this case, which turns upon the transactions underlying the creation of the new mortgage and the issues of preferred and serial bonds secured thereby, and their effect upon the plaintiff's rights as an original first mortgage bondholder, I take a view somewhat different from that expressed in Judge FINCH's opinion, as rendered upon the prior hearing; while concurring in the

Opinion per GRAY, J.

result that the judgment must be affirmed. The first mortgage, which was executed in 1871 by the Wisconsin Central Railroad Company, covered all of the company's land grant, among other things, and some of its clauses provided for the application of the proceeds of the sales of land towards the formation of a sinking fund in the trustee's hands, for the security and ultimate redemption and cancellation of the first mortgage bonds. Inasmuch as the making of this mortgage and the issuance of the bonds themselves were designed to obtain the means wherewith to construct the road, a provision was inserted looking to the possibility of the company's treasury being exhausted and its consequent inability to meet its interest obligations on the bonds. The payment of interest was to be made by the company from the proceeds of the sales of bonds and the earnings of the road; and the fourth article of the mortgage prohibits the appropriation of any part of the proceeds of land sales to the payment of interest on bonds, unless the treasury be first exhausted. Upon the happening of the event contemplated, it is then specifically provided that the company shall execute to the trustees, for the security of the bondholders, a seven per cent income bond, to an amount equal to the advance made by the trustees from the sinking fund, which should be entitled to interest before the application of the earnings of the road to the stockholders. And, by a further provision, this income bond was to be redeemed by other bonds of the company, bearing the same rate of interest, but secured by a second mortgage of the premises described in the first mortgage.

A contract was made by the company for the construction of its road, under which the contractors were to receive all the bonds and stock of the company and all the earnings of constructed road during construction. The company retained only its franchises, and the contractors assumed the entire responsibility of raising moneys by sale of these securities. The company never received any money during the period of construction and never paid out any. The contractors sold the bonds they received, and as coupons matured on them took

Opinion per GRAY, J.

them up. These facts appear in the testimony of the defendant Abbott and are undisputed. Matters proceeded in this wise until December, 1874, when it appears that the contractors claimed to hold against the company upwards of half a million of dollars, represented by these coupons. At this juncture they professed inability to advance further moneys, and the January interest was unprovided for; so the sinking fund was resorted to for relief. Such resort as was then had, in my view of the case, was improper, if it was not illegal. The conditions did not exist which permitted it, and, in fact, it was done for the relief of the contractors. By their contract they had the possession of the road and were to operate it for their own benefit; that is, they were to receive all of its earnings during the period of construction. Obviously, the effect of such arrangement was to leave the company without any sources of revenue, and the result would be, an inability to meet any obligation, continuing from the period of organization until the termination of the contract. Thus it could not be said that the treasury became exhausted in December, 1874, as was required by the fourth article of the mortgage as the prerequisite for the application of the proceeds of land sales to the payment of interest on bonds. But this article assumed the existence of a condition of affairs, wherein the company stood under the obligation to pay the interest and not, as was the case here, the contractors themselves. And this brings me to the point of difference between Judge FINCH's opinion and my own, which I have adverted to as existing; which does not, however, affect the conclusion, but which, in my judgment, strengthens it.

The legal effect of the arrangement between this company and the contractors was, as between them, to render them the debtors for the interest maturing during the time the contract was in force, and their purchasing or taking up the coupons was, in fact, the payment or extinguishment of the coupons. The proceeds of the sales of the bonds, and the earnings of the road, were the stipulated sources for the payment of the accruing interest during the construction of the road, and

Opinion per GRAY, J.

those sources, by the contract of the parties, were made over to and conducted into the hands of the contractors. They had agreed to pay the interest during their possession, and they were to reimburse themselves for that item of outlay, as they had to do for any other expenditures in their undertaking. Nor is the suggestion that they paid these coupons as agents for the company sound in principle; for it would not be in accord with the legal or fair meaning of the undertaking between the parties. It would, also, seem that if agents, yet having the possession of all the principal's estate, a payment of an obligation of the principal of such a nature would be presumed to have been made from the property in the agent's hands, and would extinguish the obligation. But I cannot agree to the suggestion. The contractors, in legal contemplation, and as I think, in fact, assumed the payment of the coupons during construction. The bonds which they received, by reference to the mortgage, carried notice to them of the provisions of the mortgage, which, in its fourth article, provided that, "during the construction of the said railroad hereby mortgaged, the interest on the bonds intended to be secured hereby, shall be paid out of the earnings of the said road and the proceeds of the sales of the first mortgage bonds, and no part of the proceeds of the sale of land embraced in this mortgage, or intended to be, shall at any time be appropriated to the payment of interest on said bonds, unless the general treasury of the company shall be first exhausted."

The arrangement, therefore, which trustees and company united in making, with the object of securing this claim of the contractors for coupons paid by them, by the assignment of the contents of the sinking fund from the possession of the trustees to a third party, was illegal; for the coupons were as absolutely dead in law as though paid directly by the company over its counter, and the assignment was a direct violation of the agreement in the mortgage. Coming to the consideration of the payment of the \$150,000 of interest, about maturing in January, 1875, on the bonds, the situation, as between company and contractors, was, that it was a liability which the

Opinion per GRAY, J.

contractors were still bound to provide for and which the company could not be supposed to be obligated for. Of course, as between the company and third parties holding the bonds, the company was bound for the January interest. But if such had been enforced against the company, and the trustees had simply aided the company by advancing from the land sales proceeds, constituting the sinking fund, the company would have had an offset against the contractors, and the sinking fund would have been protected by the obligation of the company in its income bond, as contemplated in the article of the mortgage referred to. But what was actually done was to help the contractors by assigning over the whole sinking fund, to be held as a security for the payment of their claim for paid coupons and for the advance by one or more bondholders of moneys to meet the coupons to fall due. This was clearly without warrant in the law; and of this illegality the bondholders, who advanced the funds to pay future coupons, had notice through their bonds and the provisions of the mortgage and their knowledge of the facts as to the contractors' claim. It is true the trustees received from the company an income bond and a second mortgage for this assignment by them of the sinking fund, and hereafter I shall advert to the fact in connection with the facts of the so-called reorganization.

The defendants admit that the contractors were vitally interested in preventing a default and its consequences, and they say that the contractors themselves set about raising the necessary funds to care for the January coupons; but they could not, as counsel claim, use the coupons in their possession, for they were in fact paid as to the company. However, the moneys were raised by the concert of action between contractors, company and trustees, and matters went on until the foreclosure action was commenced by the trustees, upon the default of the company in July, 1875, in December, 1875. Subsequently, and pending the action, the trustees entered upon the property and took possession under that mortgage. While in possession the so-called plan of reorganization was proposed and received the acquiescence of the trustees. It was in reality but a plan

Opinion per GRAY, J.

for refunding the obligations of the company, and it was attempted to be consummated without the consent of all of the bondholders, or through the compulsory process of a decree and sale. Under this plan, a new mortgage was executed on the property, and preferred bonds were issued and given in exchange for \$400,000 of claims against the company, variously described as consisting in land income notes, in payments to equalize interest on funded and unfunded coupons, under some scheme designated as the scheme of July 1, 1875, and in a sum to cover future accruing interest on these items. The other bonds, secured by this new mortgage, were subsequent obligations to these preferred bonds, and were issued to take up the prior first mortgage bonds; the details of that scheme not being necessary to describe, in view of Judge FINCH's fuller opinion. I utterly fail to find any warrant in law, under the mortgage which defined the duties and powers of these trustees, for their consent to and participation in such a scheme, as by their answer is admitted. These claims were not entitled to precedence, or to priority of payment over the first mortgage bonds.

For reasons I have stated, the \$280,000 of land income notes, issued against the trust created of the sinking fund proceeds, to aid the contractors, were not preferred debts of the company, and, for reasons stated in Judge FINCH's opinion, which I shall not repeat here, the balance of the \$400,000 was equally not. At most, and overlooking the questionable legality of the transactions out of which they arose as claims against the company, they were entitled to the security of the fund pledged as collateral. How could they deserve protection to the extent of being secured by a prior lien on the mortgaged property? The very terms of the mortgage contemplate no such possibility, and expressly provide that the trustees shall receive for their advances from the sinking fund to pay interest, which the company has not the means to pay, and to secure the first mortgage bondholders, whose security is thus impaired, an income bond, to be redeemed by other bonds secured by a second mortgage of the premises. The

Opinion per GRAY, J.

assignment by the trustees of the sinking fund recognizes this distinctly. Nor did the holders of the land income notes, by surrendering the proceeds of the land grant sales in their trustees' hands, thereby become entitled to any priority over the first mortgage bondholders in equity. For, again assuming the legality of the transactions underlying the issue of these notes, the relinquishment of the specific security for their repayment of itself is ineffectual to promote their claim over that of the first mortgage bondholders, in the absence of the consent of all parties. No rule of law recognizes any such right, and I am aware of no principle of equity upon which a party may become preferred as a creditor over another by a voluntary surrender, or relinquishment of his security, and such this must be deemed to be, in the absence of the consent of every prior bondholder, or of proceedings had *in invitum*.

The trustees should have proceeded with the foreclosure action, and they had no power to waive subsequent defaults and to release the company from its obligations to their *cestuis qui trustent* and from causes of action, as they did in 1879. In changing the contract by releasing the company and in consenting to a new mortgage, under which the claims of their *cestuis qui trustent* were deferred in order of payment, the trustees violated their legal duty to this plaintiff and rendered themselves amenable to this action. They were vested with no such discretion as would authorize them to change or impair any legal right of the plaintiff. The mortgage did not confer any such authority, and the consent of every bondholder could not do so. Their duty to the bondholders was to them severally, and they were not at liberty to follow the advice or wishes of the majority, being still liable to the minority for a faithful administration of their trust. (*Sturges v. Knapp*, 31 Vt. 1.) With the motives of the plaintiff we are not concerned, while he has legal rights which have been disregarded and which his trustees' action threatens to disregard.

The argument that these preferred bonds worked no harm to the original bondholders I do not regard as sound. They do not equitably represent debts which are entitled to priority of

Opinion per GRAY, J.

payment. Their issue, and payments upon them of interest and of principal, are not within the terms of the original first mortgage, which represents the contract between company, trustees and the holders of bonds, and are distinct departures from that contract. All that instrument contemplated, in the event of the application of the proceeds of land grant sales to the payment of interest when needed by the company, was that an income bond should be given by the company to the trustees, ultimately to be redeemed by the issuing of bonds of the company secured by a second mortgage. It is plain that the possession by the trustees of such an income bond, the interest on which was payable before payments to the stockholders, operated as amply as a security for the first mortgage bondholders as they could possibly, in the nature of the exigency, expect.

I have discussed these questions more at length than I had intended and, perhaps, more, in view of the elaborate opinion of Judge FINCH, than was absolutely necessary, and I shall add no more. I concur in Judge FINCH's opinion upon all matters which I have not touched upon here, and I agree in his conclusion that the judgment and order appealed from should be affirmed.

DANFORTH and PECKHAM, JJ., concur for affirmance of judgment; RUGER, Ch. J., EARL and ANDREWS, JJ., dissent; the two latter on the ground that the point that the contractors were bound by their contract to pay the interest coupons as their own debt is contrary to the specific finding, which is supported by evidence, and that it is manifestly improper to affirm the judgment on a question of fact contrary to the findings.

All concur for dismissal of appeal from order.

Judgment affirmed and appeal from order dismissed.

Statement of case.

GEORGE B. ABBOTT, Public Administrator, with the Will
Annexed, Appellant, v. JOHN F. JAMES, Respondent.

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It seems the courts will not compel the specific performance by the purchaser, of a contract for the purchase of real estate, where the validity of the vendor's title depends upon a doubtful question of law, where others having rights, dependent upon the same question, are not parties to the action.

B. died, leaving no parent, child or descendant him surviving, but leaving a widow and certain heirs-at-law. By his will he gave to his wife the use of all his estate during her life or widowhood, the remainder to three charitable societies named. Then followed this clause: "Should any of the property hereby devised to said three societies, upon the death or remarriage of my said wife, consist of real estate, I direct my executor herein named to sell the same and divide the proceeds between the said three societies." Plaintiff, as administrator, with the will annexed, after the death of the widow, contracted to sell the real estate to defendant, who refused to complete the purchase. In an action to compel specific performance, the complaint alleged that B. left no personal estate, but died seized of the real estate in question; defendant demurred. *Held*, that, as under the statute (Chap. 860, Laws of 1860), the testator could not give to the charitable societies more than one-half of his property, the other half was not disposed of by the will; that the question as to whether the failure of the attempted legacies beyond one-half of the estate affected or destroyed the power of sale was of so doubtful a nature it should not be determined in an action wherein the heirs were not parties, and so would not be bound by the decision; that the question was not purely one of law, for while the facts were admitted by the demurrer and so settled in this case, the heirs might show them to be entirely different, and in case it appeared that there was personal property sufficient to pay the shares the societies could lawfully take without resort to the realty, this might affect, if it did not control, the decision.

(Argued November 27, 1888; decided January 15, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 14, 1888, which affirmed a judgment entered upon an order sustaining a demurrer to the plaintiff's complaint.

This action was brought to compel specific performance on the part of defendant, the purchaser, of a contract to purchase certain real estate.

Statement of case.

The complaint alleged, in substance, that Augustine Barker died in 1877, leaving no personal property, but seized of the real estate in question; that he left him surviving no parent, child or descendant but his widow, and certain nephews and nieces, his heirs-at-law; that he left a last will and testament, the material portion of which is as follows:

"First. I direct that all my just debts and funeral expenses be paid.

"Second. I give to my wife all my household furniture, including the clothing of the family.

"Third. I give unto my said wife during her life, should she remain unmarried, the use of all my property, real and personal, of every description, not hereinbefore bequeathed.

"Fourth. Upon the death of my said wife or her remarriage, whichever may first happen, I give all my said property, the use of which I have given to my wife during her life or widowhood, as aforesaid, to the three following-named societies, to wit: To the American Home Missionary Society, the American Sunday School Union, established in the city of Philadelphia, and the American Tract Society, instituted in the city of New York, to be equally divided between the said three societies. Should any of the property hereby devised to said three societies, upon the death or remarriage of my said wife, consist of real estate, I direct my executor, herein named, to sell the same and divide the proceeds between the said three societies."

The complaint further alleged that the three societies named were corporations duly organized and qualified to take by devise or bequest, but were within the provision of the act "relating to wills" (Laws of 1860, chap. 360). That of the executors named in the will the widow alone qualified, and upon her death letters of administration, with the will annexed, were duly issued to plaintiff as public administrator of the county of Kings. That plaintiff caused said real estate to be advertised for sale at public auction, and on such sale it was duly struck off to defendant, who signed the usual contract and terms of sale, but declined to complete the purchase.

Statement of case.

Defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action.

William Ives Washburn for appellant. The direction in the will to sell the real estate and divide the proceeds is in itself a valid power of sale. (*Vincent v. Newhouse*, 83 N. Y. 505.) The right to exercise such power to sell the real estate, passed to the plaintiff as administrator with the will annexed. (*Mott v. Ackerman*, 92 N. Y. 539.) The validity of the power of sale is not affected by the incapacity of the residuary legatees to receive the entire amount bequeathed. (*Vincent v. Newhouse*, 83 N. Y. 505; *Kearny v. Miss. Soc. of St. Paul*, 10 Abb. N. C. 274; *Horton v. McCoy*, 47 N. Y. 21; *Moncrief v. Ross*, 50 id. 431; *Hollis v. Drew Theolog. Sem.*, 95 id. 166; *Chamberlain v. Chamberlain*, 43 id. 424.) The title which the plaintiff tenders to the defendant is good and marketable. (*Fleming v. Burnham*, 100 N. Y. 1.) Under the direction in the will, the real estate must be deemed personal estate under the doctrine of equitable conversion. (*Dodge v. Pond*, 23 N. Y. 69; *Hatch v. Bassett*, 52 id. 359; *Fisher v. Banta*, 66 id. 468; *Vincent v. Newhouse*, 83 id. 505.)

William N. Dykman for respondent. The heirs of testator take their half as land because the purpose for which he directed a conversion is invalid to the extent of the heirs' one-half. (*Wood v. Cone*, 7 Paige, 471; *Wood v. Keys*, 8 id. 364; *Chamberlain v. Chamberlain*, 43 N. Y. 424; *Chamberlain v. Taylor*, 105 id. 185, 194.) This undivided half is not subject to the power of sale, because the purpose of the power has failed, and, therefore, the power has ceased. (*Fisher v. Banta*, 66 N. Y. 476; *Prentice v. Janssen*, 79 id. 478, 486.) There being a substantial question as to the title, and the necessary parties to its complete determination not being before the court, the purchaser ought to be relieved. (*Jordan v. Poillon*, 77 N. Y. 518.) It is not enough to show that upon the whole case presented the title is not free from suspicion, but is, to say the least, doubtful. (*McCahill v. Hamilton*, 20 Hun, 388, 393.)

Opinion of the Court, per FINCH, J.

FINCH, J. The majority of the court are of opinion that the question upon which the validity of the purchaser's title depends is so doubtful that we ought not to decide it, and compel an acceptance of the deed in the absence of and without hearing the heirs-at-law whose rights depend upon the same question. We have acted upon that basis many times; generally, it is true where the doubt arose upon the facts, but sometimes, I think, where the question was one of law. (*Jordan v. Poillon*, 77 N. Y. 518; *Fleming v. Burnham*, 100 N. Y. 8.) The ultimate inquiry here presented is whether the power of sale given by the will failed as to so much of the real estate as could not pass to the three charitable societies named as legatees in the will. The testator gave to his wife during her life or until her remarriage the use of all his property, real and personal. He had no children, and his only heirs-at-law were nephews and nieces. Upon the death or remarriage of his wife he gave the whole of his property to the three societies named, and then provided that if at the date of the distribution any of his property should consist of real estate that should be sold and converted into money and the proceeds divided among the societies. It is conceded that, by force of chapter 360 of the Laws of 1860 the testator could not give to the charitable societies more than one-half of his property, so that the half which they could not take was undisposed of by the will.

Two opposite theories have been argued as solutions of the difficulty. The courts below have held that the absolute title to one-half of the estate vested in the testator's heirs-at-law and the purpose of the power having failed as to that half the direction to sell fell to the same extent and the title of the heirs became freed from its incumbrance. This view assumes that the power of sale was given solely for convenience of division among the three societies. But the appellants contend that the failure of the attempted legacies beyond one-half of the estate does not affect or destroy the power of sale; that such power was both absolute, imperative and independent; that it was supported by the peremptory mandate of the tes-

Opinion of the Court, per FINCH, J.

tator and not by some ulterior purpose to which it was accessory or a necessary or convenient incident; and that even if its purpose be declared to have been to facilitate division among the societies, that purpose has not wholly failed, and we cannot say that the direction would have been withheld if the testator had known that one-half of his property would not pass under his will.

Numerous authorities are cited on both sides and many considerations are advanced not necessary to be repeated. While upon the inquiry involved I have, perhaps, formed some decided opinion, I am obliged to admit that the question is doubtful and debatable, and justifies the differences of opinion which have arisen among us. Those differences have not been wholly founded upon questions of law, but have rested somewhat upon the uncertain and undisclosed character of the facts; for while they are settled in this case by the complaint and demurrer, the heirs may show them to be entirely different and will be at liberty to do so if they can.

If, at the death of the testator, they should show that only one-quarter of his property was real estate, and the value of that could be fixed by proof or by agreement, the share going to the societies would be easily ascertained and payable out of the personal estate without need of a resort to the land, and no purpose or necessity would exist for the power of sale. Possibly, in that event, the heirs would have a right to hold their share in land by the exercise of an option, even if the power of sale was not otherwise extinguished. But if, at testator's death, the situation was different and three-quarters or the whole of his estate was realty, a sale of the land would be needed for payment to and division among the charitable societies, and the argument in support of the power of sale would be much stronger. What the facts are we do not know, beyond the admission of the present parties, and they might easily prove to be such as at least to affect the decision, if not to dictate it. So that even if, in a case dependent upon a bare question of law, we ought to decide it, and adjudge the title tendered to be good or bad, we have not before us a case

Opinion of the Court, per FINCH, J.

wholly independent of unknown facts and certain not to be affected by them.

In such an emergency we must remember that if we force this title upon the purchaser, he may have to confront the heirs-at-law in a future litigation. They are not before us and will not be bound by our decision. They will have a right to be heard, both as to the facts and the law, and since the question is doubtful and quite evenly poised, we think we ought not to expose the purchaser to the possible risks of the situation. We have, therefore, briefly stated the question sufficiently to disclose its general character, and without any argument upon it, which would be improper in view of our conclusion.

For the reason given, and without deciding the question involved, we think the judgment should be affirmed, with costs.

All concur except EARL, J., not voting.

Judgment affirmed.

MEMORANDA

OF THE

CAUSES DECIDED DURING THE PERIOD EMBRACED IN THIS
VOLUME, WHICH ARE NOT REPORTED IN FULL.

JOHN W. MASURY, Appellant, v. WILLIAM H. WHITON,
Executor, etc., Respondent.

111	679
169	497
169	499

The award of an arbitrator cannot be set aside for mere errors of judgment as to the law or facts. If the arbitrator keeps within his jurisdiction and is not guilty of fraud, corruption or other misconduct affecting his award, it is unassailable.

(Argued October 15, 1888; decided November 27, 1888.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 15, 1887, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

This was an action to set aside an award. The answer set up the award as a counter-claim, asking judgment for the amount awarded. The trial court found against the plaintiff, dismissed the complaint and gave judgment for defendant on the counter-claim. The court here, after a discussion of the facts, reach the conclusion that the arbitrator did not exceed his jurisdiction and that there was no evidence of any misconduct on his part.

The following is the *mem.* of opinion:

"The award of an arbitrator cannot be set aside for mere error of judgment as to the law or facts of the case submitted to him. If, in making his award, he keeps within his jurisdiction and is not guilty of fraud, corruption or other misconduct affecting his award, then his award is unassailable. (*Perkins*

v. *Giles*, 50 N. Y. 228; *Morris River Coal Co. v. Salt Co.*, 58 id. 667; *Fudickar v. Guardian Mutual Life Ins. Co.*, 62 id. 392.”

John L. Hill for appellant.

Moody B. Smith for respondent.

EARL, J., reads for affirmance.

All concur.

Judgment affirmed.

111	680
112	528

In the Matter of the Application for Letters of Administration on the Goods, Chattels and Credits of **DAVID WALKER WILLIAMS**, Deceased.

(Argued October 19, 1898; decided November 27, 1898.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made March 31, 1887, which affirmed a decree of the surrogate of the county of New York granting letters of administration to the mother of the decedent, a non-resident.

Thomas Jackson for appellant.

William Allen Butler for respondent.

Agree to affirm on authority of *In re Page* (107 N. Y. 266).

All concur.

Order affirmed.

CORNELIA M. BIDEN et al., Respondents, v. **EDWARD F. JAMES**,
Impleaded, etc., Appellant.

(Argued October 26, 1888; decided November 27, 1888.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made November 19, 1886, which affirmed a judgment

in favor of plaintiffs, entered upon a decision of the court on trial at Special Term.

T. F. Hamilton for appellant.

Henry H. Man for respondents.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

JULIEN T. DAVIES, as Receiver, etc., Respondent, *v.* **JAMES D. FISH** et al., Appellants.

(Argued November 27, 1888; decided December 4, 1888.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made January 3, 1888, which reversed an order of Special Term allowing certain parties to intervene and defend herein.

G. W. Cotherill for appellants.

James Byrne for respondent.

Agree to dismiss appeal ; no opinion.

All concur.

Appeal dismissed.

THE NATIONAL IRON BANK, Respondent, *v.* **PATRICK FARRELLY**, Appellant.

(Argued October 13, 1888; decided December 4, 1888.)

MOTION to dismiss an appeal from a judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered on an order made January 14, 1887, which affirmed a judgment of the General Term of the City Court of New York, affirming a judgment in favor of plaintiff.

W. C. Beecher for motion.

Abbett & Fuller opposed.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

GEORGE E. FUECHSEL, Respondent, *v.* ANNA BELLESHEIM et al.,
Appellants.

(Argued October 16, 1888; decided December 4, 1888.)

MOTION to dismiss an appeal from a judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order which affirmed a judgment of Special Term in favor of plaintiff.

Flamen B. Candler for motion.

Henry H. Davis opposed.

The following is the *mem.* of decision:

"It does not appear that notice of this motion was served on the infants or their guardian or attorney, and for that reason, as to them, it is denied. As to the adult appellant the motion is granted, without costs."

All concur.

Ordered accordingly.

GEORGE W. GLYNN, Administrator, etc., Appellant, *v.* THE
SEAMAN'S BANK FOR SAVINGS IN THE CITY OF NEW YORK,
Respondent.

(Submitted November 27, 1888; decided December 4, 1888.)

MOTION to dismiss an appeal from a judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, made May 12, 1887, which affirmed a judgment of the General Term of the City Court

of New York reversing a judgment for plaintiff entered on the verdict and dismissed the complaint.

Strong & Cadwalader for motion.

Raphael J. Moses opposed.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

AUGUSTUS ROSS, as Executor, etc., et al., Respondents, *v.*
DE WITT A. GLEASON, et al., Appellants.

The General Term has power to amend an order of reversal so as to show that the reversal was upon the facts, although an appeal has been perfected and a return made to this court, and the order as amended may be attached to the return.

(Argued November 27, 1888; decided December 4, 1888.)

MOTION to amend an order of the General Term of the Supreme Court in the third judicial department, made at the April Term, 1887, which reversed a decree of the surrogate of Chenango county denying probate to a codicil to the last will and testament of Alexander Foster, deceased, plaintiff's testator. The motion was referred back and the return herein to the General Term, and that a motion may then be made to amend the order of reversal by inserting after the words "is hereby reversed" the words "on questions of fact and law."

Solomon Bundy for motion.

Albert F. Gladding opposed.

The following is the *mem.* of decision:

"Motion denied, without costs, upon the ground that the General Term have power to entertain a motion to amend their order, which, if done, may be attached to the return in this court."

All concur.

Motion denied.

PHILIP DEOBOLD, as Executor, etc., Respondent, *v.* FREDERICK
OPPERMANN, Jr., et al., Appellants.

This case presented the same questions and was argued and
decided with *Deobold v. Oppermann*. (*Ante*, p. 531.)

THE PEOPLE *ex rel.* ANDREW MCCLINTOCK, Appellant, *v.*
STEPHEN B. FRENCH et al., Com'rs, etc., Respondents.

(Argued November 27, 1888; decided December 11, 1888.)

APPEAL from order of the General Term of the Supreme
Court in the first judicial department, made January 23, 1888,
and an order amending the same made March 10, 1888, which
affirmed the proceedings of the Police Board of the city of
New York dismissing the relator from the force.

Louis J. Grant for appellant.

D. J. Dean for respondents.

Agree to affirm; no opinion.

All concur.

Orders affirmed.

JOHN S. BARRY, Respondent, *v.* J. FRANK CALDER et al.,
Impleaded, etc., Appellants.

(Argued November 27, 1888, decided December 11, 1888.)

APPEAL from order of the General Term of the Supreme
Court in the third judicial department, made May 18, 1888,
which affirmed an order of Special Term denying a motion to
set aside an order of arrest.

G. B. Wellington for appellants.

C. S. McChesney for respondent.

Agree to affirm order; no opinion.

All concur.

Order affirmed.

HENRY C. HENDERSON, Respondent, *v.* THE COMMERCIAL
ADVERTISER ASSOCIATION, Appellant.

(Argued November 27, 1888; decided December 11, 1888.)

APPEAL from an interlocutory judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 13, 1887, which reversed a judgment entered upon an order sustaining a demurrer to the complaint herein and gave defendant leave to withdraw the demurrer and answer.

Charles O. Brewster for appellant.

William C. Reddy for respondent.

Agree to affirm judgment; no opinion.

All concur.

Judgment affirmed.

ELIZABETH PHILLIPS, Administratrix, etc., Respondent, *v.*
THE TROY AND BOSTON RAILROAD COMPANY, Appellant.

(Argued December 3, 1888; decided December 11, 1888.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made November 30, 1886, which affirmed a judgment entered upon a verdict in favor of plaintiff.

Edgar L. Fursman for appellant.

E. Countryman for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

JOHN SPICKERMAN, Respondent, *v.* ADAM MCCHESENEY, as
Executor, etc., Appellant.

(Argued December 4, 1888; decided December 11, 1888.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made the third Tuesday of November, 1886, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

The prominent points presented in this case were disposed of on the ground that they related to questions of fact, as to which there was evidence sufficient to justify the findings, and so that the decision of the court below was conclusive. Other objections were disposed of on the ground that they were not raised on the trial.

Edgar L. Fursman for appellant.

G. B. Wellington for respondent.

DANFORTH, J., reads for affirmance.

All concur.

Judgment affirmed.

MARY FITZGERALD, Administratrix, etc., Respondent, *v.* THE
CITY OF BINGHAMTON, Appellant.

(Argued November 28, 1888; decided December 18, 1888.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made April 20, 1886, which affirmed a judgment entered upon a verdict in favor of plaintiff.

A. D. Wales for appellant.

Edmund O' Connor for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

In the Matter of the Personal Estate of ELIZABETH R. WEST,
Deceased.

(Argued November 28, 1888; decided December 18, 1888.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made April 20, 1886, which affirmed a decree of the surrogate of Oneida county revoking, as to Mary R. Jones, letters of administration issued to her and one Joseph E. West upon the goods, chattels and credits of Elizabeth R. West, deceased.

D. C. Stoddard for appellant.

William Kernan for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

In the Matter of the Accounting of MARY R. JONES, as
Administratrix, etc.

(Argued December 8, 1888; decided December 18, 1888.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made May 1, 1886, which affirmed so much of a decree of the surrogate of Oneida county settling the accounts of Mary R. Jones, as administratrix of the estate of Elizabeth R. West, deceased, as allowed her costs, expenses and counsel fees in proceedings to remove her as administratrix.

William Kernan for appellant.

D. C. Stoddard for respondent.

"Agree to dismiss appeal, with costs, on the ground that the allowance was discretionary;" no opinion.

All concur.

Appeal dismissed.

688 MEMORANDA OF CAUSES NOT REPORTED.

THE PEOPLE ex rel. CARL SCHURZ et al., Appellants, v.
FREDERICK COOK, Secretary of State, etc., Respondent.

(Argued December 11, 1888; decided December 18, 1888.)

MOTION to amend remittitur by stating therein the grounds of the decision upon papers showing the intent of the relator to appeal to the Supreme Court of the United States.

George Zabriskie for motion.

Charles F. Tabor, attorney-general, opposed

"Agree to deny motion on the ground that the relator can procure the transmission of a duly authenticated copy of the opinion of the court with the record for use by the United States Supreme Court."

All concur.

Motion denied.

DAVID KAHNWIELER, Respondent, v. ANDREW J. SMITH,
Executor, etc., Appellant.

(Submitted December 10, 1888; decided December 21, 1888.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made February 7, 1887, which modified a judgment in favor of plaintiff by excluding therefrom the costs of the trial, and affirmed the judgment thus modified.

Butler, Stillman & Hubbard for appellant.

George H. Yeaman and *George F. Murray* for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

PROCEEDINGS
IN THE
COURT OF APPEALS

IN REFERENCE TO THE DEATH OF

EDWIN O. PERRIN,

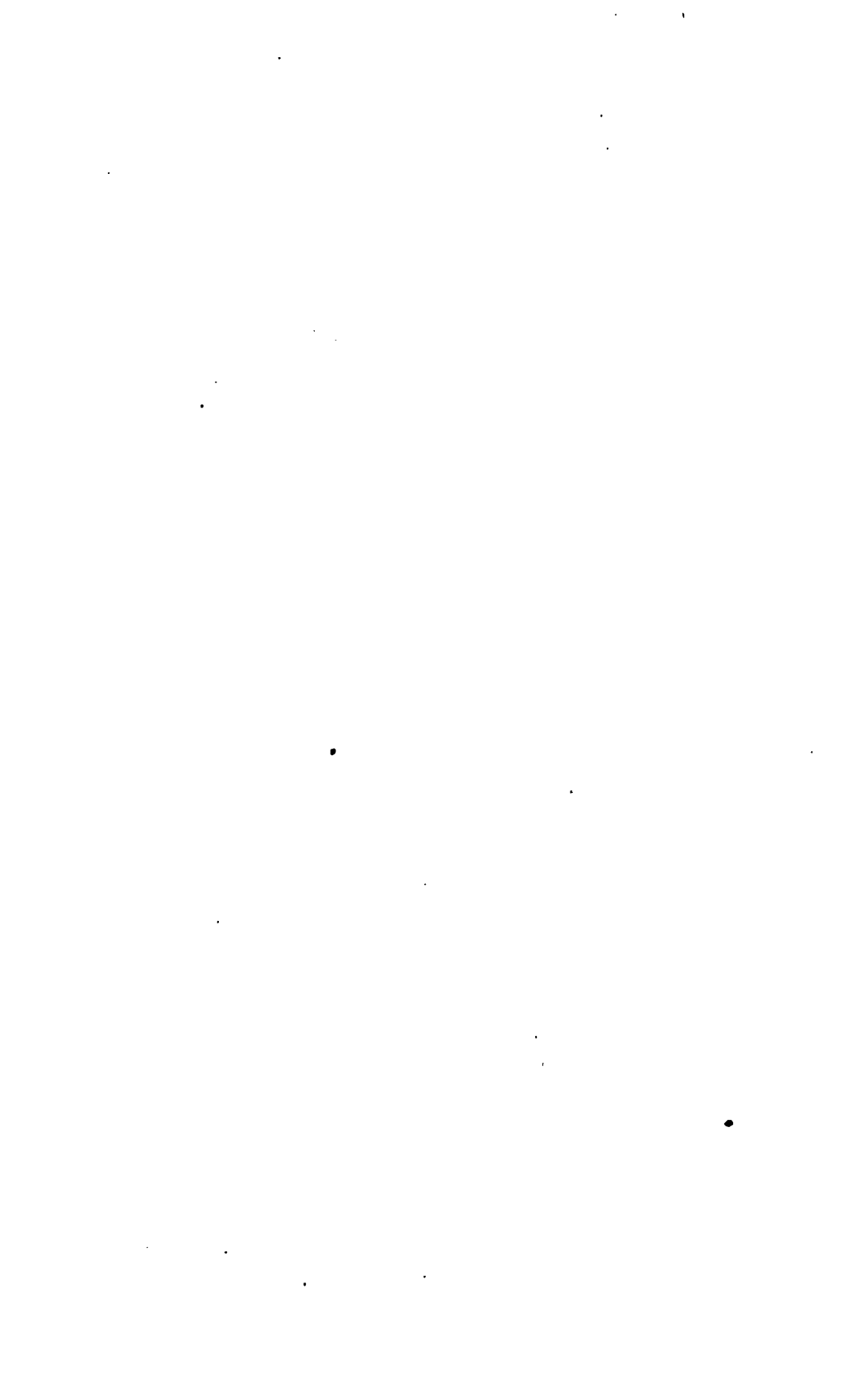
LATE CLERK OF SAID COURT,

WHO DIED WEDNESDAY, DECEMBER 19TH, 1888.

IN COURT OF APPEALS, }
ALBANY, N. Y., *December 21, 1888.* }

The court directs an entry on the minutes of the death of EDWIN O. PERRIN, Esq., for more than eighteen years the faithful clerk of this court, in which position he commended himself to the approval of the bench and bar, esteemed by all who knew him for his manly and attractive qualities. His death is sincerely mourned and the court on this sad occasion tender to his family its sincere sympathy.

SIOCKELS—VOL. LXVI 87



INDEX.

ABATEMENT AND REVIVAL.

1. Although under the Code of Civil Procedure (§ 755), an action in no case abates by the death of a party where the cause of action survives, as an application to the court is necessary to authorize its revival or continuance, the court may, on the ground of inexcusable *laches*, and, where otherwise irreparable injury will be suffered by the opposite party, deny the application; the right to a continuance of the action is not of so absolute a nature as to preclude the court, in the exercise of a legal discretion, from denying it. *Lyon v. Park.*

850

2. *It seems* that where a cause of action survives, the plaintiff upon the death of a defendant may be entitled to a continuance under said provision, although the circumstances do not bring the case within any of the provisions subsequent to the one above referred to (§§ 757, 758, 759), unless *laches* is a sufficient answer to his motion. *Id.*

3. This action was commenced in 1877 to recover damages for alleged fraud and conspiracy. In 1878, on application of defendants and on the ground that plaintiff was a non-resident, an order was made requiring him to file security for costs within sixty days after service of order, and until this was done, staying all proceedings on his part, except to move to vacate the order. The order was duly served but plaintiff did not comply therewith. Defendant P. died in 1882 and defendant B. in 1884. In June, 1886, the plaintiff moved to revive and continue the action against the personal representatives of said defendants and to be relieved from his

default and failure to file a bond. It was shown in opposition that said defendants were material witnesses for the defense, and that numerous other important witnesses had died since the stay of proceedings, by reason of which the defense would be greatly prejudiced. *Held*, that the motion was properly denied for *laches*. *Id.*

4. B. was at his death a resident of the state of Vermont. Letters of administration on his estate were issued in that state, but no letters ancillary or original have been issued in this state. *Held*, that, conceding the provision of said Code (§ 757), requiring the court on motion to allow or compel an action to be continued in case of the death of a sole plaintiff or sole defendant, precluded the court from denying such a motion (as to which, *quære*), it had no application here, as defendant P. was not sole defendant, and B., who upon the death of P. became sole defendant, was alone within that provision, and over his administrator the court had no jurisdiction. *Id.*

ACCOUNTS.

Plaintiff's complaint in an action in a court of record contained seven causes of action, aggregating \$552.50, besides interest. The answer, besides a general denial, set up two counter-claims, aggregating \$561.26, besides interest. These grew out of transactions in no way connected with plaintiff's causes of action, and had not in any way been applied by the parties in reduction of plaintiff's claim. Upon the trial the parties gave evidence in support

of each of their respective claims. The jury brought in special findings for the plaintiff on three of the causes of action amounting to \$657.84, and for defendant on one of his counter-claims \$684.26; balance in favor of plaintiff \$28.59. Under the direction of the trial court they rendered a general verdict for the plaintiff for \$28.59. *Held*, that the causes of action and counter-claim so established were subsisting accounts between the parties within the meaning of the provision of the Code of Civil Procedure (§ 2863, subd. 4), declaring that a justice of the peace shall not take cognizance of a civil action "where in a matter of account, the sum total of the accounts of both parties, proved to the satisfaction of the justice, exceeds \$400." *Sherry v. Cary*. 514

ACCOUNTING.

1. An executor has no authority to credit in his accounts items not constituting a legal charge against the fund in his hands. *In re Selleck*. 284
2. Credits, therefore, for payment of taxes not a lien on property of the testator at the time of his death, or on property not owned by the testator, and credits for payments made by the executor, by request of heirs, and for which the estate was not liable, are improper and may not be allowed upon settlement of the executor's accounts. *Id.*
3. Upon settlement of the accounts of an executor, the surrogate disallowed a credit of \$62.50, claimed to have been paid to a surrogate many years previously. The surrogate disallowed it because there was neither a voucher nor a sufficient explanation for the payment. The General Term of the Supreme Court allowed the credit. *Held*, error. *Id.*
4. The executor, under a power of sale contained in the will, sold a lot to D. No debit for the purchase-money was made in his account. The executor explained that the

payment was made by withholding from D. moneys coming to him from the trust estate. *Held*, that it should have been entered in the accounts; and that he was properly charged therewith by the surrogate. *Id.*

5. An executor was charged with moneys received from heirs to pay a mortgage upon the testator's real estate. *Held*, in the absence of evidence that the executor withheld or appropriated the money, he was not properly charged with interest thereon. *Id.*
6. On settlement of the accounts of a testamentary trustee the claim of an administrator, with the will annexed, to commissions was rejected, and the question as to his right to commissions reserved until his accounting as administrator. *Held*, no error. *In re Paton*. 480

ACTS OF CONGRESS.

This state having, by act of its legislature (Chap. 460, Laws of 1863), accepted the grant of land made to it by the act of congress "donating the public lands to the several states and territories which may provide colleges for the benefit of agriculture and the mechanic arts" (Chap. 180, U. S. Laws, 1862) as a compliance on its part with one of the conditions of the grant, chartered said university. In the charter the income, revenue and avails received from the investment of the proceeds of the sale of the land scrip were appropriated to the university and were to be paid over to its trustees. In 1866 the legislature passed an act (Chap. 481, Laws of 1866), authorizing the comptroller to sell the scrip at not less than thirty cents per acre to the trustees of said university; in case said trustees did not contract for the purchase, then the same was to be sold by the commissioners of the land office to any person or persons. The sale in either case to be on condition and under an agreement with the purchaser that the net avails of the sale of the scrip, or

of the lands located under it, should be paid over and devoted to the purposes of said university. The trustees having failed to purchase, said commissioners entered into a contract with C. for the purchase by the latter of the scrip then undisposed of. By the agreement C. contracted to purchase at thirty cents per acre, to be paid on delivery of the scrip, to locate and sell the land and pay the net proceeds, less the amount paid into the state treasury. From such net proceeds it was agreed that a sum equal to an additional thirty cents per acre should be added to and form part of the fund known as, the "College Land Scrip Fund," and that the remainder should constitute a separate fund to be known as the "Cornell Endowment Fund," which should "be the property of the Cornell University," the principal thereof to remain forever unimpaired, the income to be annually appropriated by the legislature and paid over to the trustees of said university. Subsequently, under an agreement between C. and the university, made with the consent of the comptroller and the said commissioners, C. conveyed to the university all the rights and interests he had acquired under the said contract and the university assumed his place. Pursuant to the act of 1880 (Chap. 317, Laws of 1880), directing it, the legislature transferred to the university the moneys and securities constituting the "Cornell Endowment Fund." *Held*, that the agreement between the commissioners and C. was, in effect, a sale by the state of the scrip at thirty cents per acre, with an additional thirty cents, if so much should be realized upon sale by the vendee; and upon the transfer to him he became the legal owner; that the residue of the proceeds agreed to be paid into the state treasury was to be so paid, not as part of the purchase-price, but as profits and as the property of the university; that said agreement was fully authorized by the said act of 1880; that neither said act nor the agreement was in contra-

vention of the act of congress; that the university by the transfer from and its agreement with C., and by receiving the moneys and securities of the Cornell Endowment Fund, by virtue of the act of 1880, became the owner of this fund and was not a debtor of the state on account thereof; and that therefore the property which thus came into the possession of the university was held by it within the meaning of its charter, and so was to be included in estimating the amount of property held by it at the time of the bequest.
In re McGraw 66.

ADVANCEMENT.

The will of R. gave his residuary estate to five beneficiaries, his four children and a college, in unequal proportions, two children to whom advances had been made prior to the making of any will by the testator receiving less than the others. The will provided that "any moneys or indebtedness" that should appear upon the testator's inventories or books of account charged as "due him from any of said beneficiaries during his lifetime as an outstanding or unsettled account" at the time of his decease should be considered as forming part of his estate, and a discharge thereof by his executors, should be considered as so much payment and should be deducted from the share of such beneficiary, but without interest, unless some obligation "securing such indebtedness" should be found among the testator's assets upon which interest had been paid or charged, in which case it was declared "the said indebtedness shall continue to be charged." It was also declared that any moneys which should appear in his books charged to either of said beneficiaries "to a furniture or allowance account" should not be debited to such beneficiary on settlement of the testator's estate, but should be "considered as a gift." *Held*, that the provision directing a deduction for indebtedness contemplated an actual indebtedness which might have been

enforced by the testator in his lifetime, and so did not include the advances above mentioned, which were entered in his books and charged to said children as advances, and in his inventories up to the time of the execution of a will as "unavailable assets," although included as part of the estate "for distribution;" it appearing that in subsequent inventories they were not so included. *In re Robert.* 373

AMENDMENT.

The General Term has power to amend an order of reversal so as to show that the reversal was upon the facts, although an appeal has been perfected and a return made to this court, and the order as amended may be attached to the return. *Ross v. Gleason.* 683

ANTE NUPTIAL AGREEMENT.

1. In an ante-nuptial agreement, both the parties to which were persons of large means, after clear and definite provisions had been made as to the interest each should take in the property of the other during life and after the death of the other, was contained the following clause: "All the furniture, plate, horses, carriages and other personal property *in use by the parties for family purposes*, at the time of the death of either, shall vest absolutely in the survivor." The parties intermarried, and F., the husband, died first. In an action by the executor of the wife to recover certain personal property, the title to which he claimed became vested in the wife, *held*, that the clause included such property as they both had been accustomed to use in their domestic life, and the continued enjoyment of which was essential to the personal comfort and convenience of those habituated to its daily use; that it did not include property not so in use, or such as was employed for the use and enjoyment of the respective parties individually; nor did it include heir-looms, valuable

mainly because of their relation to and association with the family of one of the parties, by whose members it had been acquired. *Gorham v. Fillmore.* 251

2. Among the property claimed by plaintiff was a large and very valuable library owned by F. at his decease, the collection of which had occupied his lifetime. He had held the office of President of the United States, and, during his incumbency of that office, large additions to the library were made, more or less associated with the office. *Held*, that the library did not pass to the wife under the clause in question. *Id.*

3. F. owned a quantity of silverware, which had been kept in a box in a safe, and which was marked with his initials and those of other members of his family, and other silverware purchased by his first wife with the proceeds of a present made to her while she occupied the presidential mansion, none of which had been in ordinary use, but were kept in store by themselves. On one or two occasions of public receptions a few of the pieces of plate had been used to decorate the tables and rooms. *Held*, that this silverware was not included in the contract. *Id.*

4. So, also, *held*, as to a quantity of wines acquired by F. while he was president, none of which, so far as appeared, had ever been used for family purposes. *Id.*

5. So, also, *held*, as to trunks bought and used by F. individually, and other personal property which had, for a long time, been excluded from the house and had not been in use. *Id.*

APPEAL.

1. Where testimony has been improperly received by the surrogate, it is not a sufficient ground for a reversal of his decree "unless it appears to the appellate court that the exceptant was necessarily prejudiced thereby," (Code of Civil Pro. § 2545); *i. e.*, to authorize a

- reversal it must appear that without the improper evidence the respondent would not have succeeded. *Loder v. Whelpley*. 239
2. Under the Code of Civil Procedure (§§ 2557-2559, 2570), it is within the discretion of a surrogate, upon the settlement of the accounts of an executor or testamentary trustee to award costs "payable by the party personally or out of the estate or fund as justice requires;" and, while the exercise of this discretion is so qualified by the words "as justice requires" as to authorize the interposition of the General Term, where there has been an abuse of discretion and a violation of justice, it has no other power of review. *In re Selleck*. 284
8. When the General Term reverses a surrogate's decree, imposing costs upon an executor or trustee personally, it must appear in the order of reversal that the ground therefor was the abuse of discretion by the surrogate; in the absence of this statement, the order is not sustainable. *Id.*
4. *It seems* the granting or refusal of a motion to postpone the trial of a criminal action is in the discretion of the court, and its decision thereon, where there is no abuse of discretion, is not reviewable upon appeal. *People v. Jackson*. 362
5. The power of the court to order either plaintiff or defendant to furnish a bill of particulars extends to all descriptions of actions, and the scope of the order is ordinarily a question of discretion, and so not reviewable on appeal. *Cunard v. Francklyn*. 511
6. A judgment in a partition suit directed a sale, the description of the premises, after giving the metes and bounds, closed thus: "Containing thirty-one acres, more or less." The notice of sale contained the same description. In a hand-bill issued before the sale in the name of the referee appointed to sell, the boundary lines were omitted and the premises briefly described as the farm of D. "containing thirty-one acres." The sale took place upon the premises and the contract signed by the purchaser contained the words "more or less." He sought to be relieved from his purchase on the ground that when he bid he had one of the hand-bills in his possession and believed that the premises contained thirty-one acres when, in fact, they contained only twenty-four and three-quarters. *Held*, that the matter was one resting in the discretion of the court below, and its determination was not reviewable here. *Dennerlein v. Dennerlein*. 518
7. To authorize the General Term to review the facts on an appeal from a surrogate's decree admitting a will to probate, it is not essential that the surrogate's finding of fact should be challenged by an exception, nor is any request to find further facts necessary. An appeal on the facts, as well as on the law, is sufficient to give the appellate court jurisdiction, and an exception to a finding of fact is neither necessary or proper. *Burger v. Burger*. 528
8. The questions which may be raised by exception under the Code of Civil Procedure (§ 2545), permitting an exception to be taken to the ruling of a surrogate upon an issue of fact, are questions of law. The finding of a material fact without evidence, a refusal to pass upon a question of fact, or to find a fact which the evidence conclusively establishes, if properly excepted to, raises a question of law, and to such a ruling an exception is permitted under said section; but it has no relation to findings on controverted facts or to refusals to find facts not conclusively established. *Id.*
9. An order of the General Term reversing, on the facts, the decree of the surrogate and directing issues to be tried by a jury, is not reviewable here. *Id.*
10. An order of General Term, reversing a judgment entered upon a verdict directed by the trial court and ordering a new trial, is not *res adjudicata* between the parties,

and upon an appeal to this court from a General Term judgment, affirming a judgment rendered on a second trial, every question of law appearing in the record can be considered as if the General Term decision was rendered upon a first appeal. *Siedenbach v. Riley*. 560

11. An order awarding costs to an administrator, where he is not entitled to them, is reviewable here. (Code, § 191, subd. 3.) *Hopkins v. Lott*. 577

12. An order of the General Term of the Supreme Court affirming an order of Special Term confirming the report of the commissioners of estimate and assessment in proceedings to acquire title to lands for the purpose of establishing a public place in the city of New York under the act of 1884 (Chap. 451, Laws of 1884), is not reviewable here. *Matter Board of Street Opening, etc., N. Y* 581

13. Such an order is not made appealable, on the ground that its effect is to overrule the objections of the landowners and their request that the proceedings be discontinued, where it does not appear by the record that any order was made upon the objections and request, either independently or embodied in the order made; only the order made and appealed from can be considered. *Id.*

14. Under the amendment of the section of the Code of Civil Procedure making provision for the trial by jury of controverted questions of fact arising in proceedings in Surrogate's Court (§ 2547) made in 1886 (Chap. 119, Laws of 1886), which authorizes the surrogate of the county of New York, in his discretion, to transfer to the Court of Common Pleas proceedings for the probate of a will, for the purpose of having the issues of fact therein tried by a jury, and provides for the review of the verdict of a jury, this court is not given jurisdiction, on appeal to it from an order of the General Term affirming the verdict, to review the

questions of fact for the purpose of determining whether the verdict was against the weight of evidence; its jurisdiction is limited to the review of questions of law. (§ 1387.) *In re Will of Bull*. 624

15. P., plaintiff's intestate, prepared the general plans and specifications for the construction of a house for defendants under an oral agreement between them. After all the work called for had been done and payments had been made thereon, a writing was signed by the parties in which, after an acknowledgment of receipt by P. of the amount paid, it was stated that this left "a balance due" of a sum stated, which defendants agreed to pay in installments, the last installment when the roof was on. It was then added that this should "be in full for all services for plans of exterior and floor plans on the building." In an action to recover a balance alleged to be due evidence was given on the part of P., under objection and exception, that the services were worth much more than the sum agreed upon. The recovery, however, was in accordance with the amount acknowledged in the paper. *Held*, that defendants could not have been injured by the evidence, and so that its reception, if erroneous, was no ground for reversal. *Pfeiffer v. Campbell*. 631

16. The General Term has power to amend an order of reversal so as to show that the reversal was upon the facts, although an appeal has been perfected and a return made to this court, and the order, as amended, may be attached to the return. *Ross v. Gleason*. 683

— When surrogate's decrees allowing costs to administrator, not reviewable here.

See *In re Jones*. (Mem.) 687

— When the executor of a deceased plaintiff has been substituted in his stead the right of the executor to continue the action is adjudicated by the order of substitution, and cannot be questioned on appeal from judgment in the action.

See *Greenwood v. Marvin*. 423

—When motion to dismiss appeal denied for want of proper notice.
See *Frischael v. Bollesheim*. (Mem.) 683

ARBITRATION.

- 1 Both at common law and under the Code of Civil Procedure (§ 2383), a submission to arbitration may be revoked by any party thereto at any time before the matter has been finally submitted to the arbitrators for their decision; and this is so although the agreement to arbitrate provides against any revocation, and, by its terms, the party seeking to revoke, for a valuable and executed consideration, expressly waived, and abandoned the right to revoke. Such stipulations, like other executory agreements if broken, simply leave the other party to seek redress by action for damages. *People ex rel. v. Nash*. 810
- 2 The arbitrators derive their power to act simply from the continuing consent of the parties, and when the agreement, while yet executory, is broken by the refusal of a party to be bound by or to perform it, the power of the arbitrators ceases. *Id.*
- 3 As to whether the court has power by *mandamus* to compel the performance by arbitrators of their functions, *quære*. *Id.*

ARBITRATOR.

See AWARD.

ASSESSMENT AND TAXATION.

- 1 The provisions of the act of 1880 (Chap. 550, Laws of 1880), providing for vacating and modifying assessments for local improvements in the city of New York, apply only to cases of assessments which are a lien at the time of the commencement of proceedings. *Diefenthaler v. Mayor*, etc. 881

- 2 The remedy given by said act to an individual who has paid an illegal or irregular assessment applies only where an assessment for the same improvement upon the lands of other parties has been vacated or reduced by the commissioners appointed under the act. *Id.*
- 3 In an action, therefore, to recover back a proportionate part of moneys paid upon an assessment *prima facie* valid, and which created an apparent lien upon the land assessed, where the facts rendering a portion of the assessment invalid were all *de hors* the record, it is no defense that the assessment has not been vacated or reduced under and in pursuance of said act. *Id.*
- 4 The six-years statute of limitations applies to such a cause of action, and this is so, conceding the necessity of a provision in the judgment vacating or reducing the assessment; this is a mere incident to the legal cause of action to recover back the money paid. *Id.*
- 5 *It seems* where an assessment has been paid, a court of equity has no jurisdiction of an action brought simply to have it set aside. *Id.*
- 6 The six-years statute of limitation applies to a cause of action to recover back the amount of an assessment for a local improvement paid to the city of New York, where the assessment was void for want of jurisdiction. *Jaw v. Mayor*, etc. 339
- 7 *It seems* it is wholly unnecessary in such a case to set aside the assessment, the cause of action is one of a legal nature only. *Id.*
- 8 In pleading the statute it is sufficient to aver that more than six years have elapsed since the cause of action accrued; it is not necessary to aver that, in addition to the six years, the thirty days allowed the city by its charter (§ 105, chap. 335, Laws of 1873), to pay the claim after presentation and during which time the claimant is prohibited from bringing suit, has also elapsed. *Id.*

9. Under the act of 1885 (Chap. 488, Laws of 1885), providing for the taxing of "gifts, legacies and collateral inheritances," the tax is upon the individual, and can be imposed only when the interest devised to each beneficiary exceeds \$500, the limitation provided by the statute. (§ 1.) *In re Cager*. 349
10. A tax imposed under said act, before the amendment to it of 1887 (Chap. 713, Laws of 1887) exempting legacies to adopted children went into effect, was not affected by the latter act. *Id.*
11. The will of C. gave his residuary estate to his wife M. "to be used and enjoyed and *at her disposal* during the term of her natural life." One-third of said estate "that may remain" at the decease of his said wife, the testator gave to an adopted daughter during life; the other two-thirds and the remainder of the one-third to four persons named, who were described as "the present heirs" of M. *Held*, that, upon the death of C., his widow took a life estate with a limited power of disposition during her life, for her use and enjoyment, and any interest in the other beneficiaries was dependent upon the contingency of the exercise by her of this power of disposition. *Id.*
12. The appraiser appointed by the surrogate to appraise the value of the respective interests reported that, with such a construction, the gifts over had no market-value. *Held*, that while said gifts were sustainable as valid executory devises and the beneficiaries might eventually take a valuable estate, yet as this contingency rendered the present appraisable value of such interest incapable of any correct or reasonable approximate valuation, there was no basis for the imposition of a tax. *Id.*
13. Where the present value of property devised to one, with a limitation over to others upon the happening of some event, which may or may not occur, can be ascertained, a ground for an approximate estimate of the value of the ultimate devise appears, and it may be made; but where the question as to whether any property at all will pass under the limitation over, depends upon the will of the first taker, there is no rule by which its value can be determined. *Id.*
14. As to whether an appraisal of the value of said gifts over for the purposes of taxation may be made if they eventually come to the possession of the beneficiaries when that event occurs, *quære*. *Id.*
15. The provisions of the "Lewis County Tax Law" (Chap. 153, Laws of 1884, amended by chap. 215, Laws of 1885), declaring that when taxes are assessed on lands and have been returned to the state comptroller or the county treasurer unpaid, it shall cease to be lawful for the owners to peel bark or cut timber on the land or to permit others to do so, and imposing a penalty for a violation of this command, are not obnoxious to the constitutional provisions protecting property rights. *Prentice v. Weston*. 480
16. Upon the return of the taxes as unpaid the sale of the land is the sole remaining resource for the collection of the taxes, and it is competent for the legislature to restrain acts which would strip the land of its chief value and tend to make unavailing the final remedy. *Id.*
17. The property of a municipality, acquired and held for governmental and public uses, and used for public purposes, is not a taxable subject within the purview of the tax laws, unless specially included. *People ex rel. v. Bd. Assessors*. 505
18. This exemption does not depend upon the origin of the title of the municipality, or the location of the property, but applies whether it was acquired by purchase or voluntary grant, or as the product of taxation, or whether the property is situated within or without the territorial limits of the municipality. *Id.*

19. In proceedings to review by *certiorari* the determination of the Board of Assessors of the city of Brooklyn in assessing for taxation certain premises used as a ferry landing-place, it appeared that the city of New York has occupied by its agents and trustees for two hundred and fifty years, under a conceded title, the said landing-place, and used it for the convenience of the public as an incident to a ferry franchise granted to it. *Held*, that the authority conferred and the duty imposed by the grant of the ferry franchise presupposes the right to acquire what was essential to its operation and to maintain the ferry, and as it could not be operated without a landing on the Brooklyn side, the franchise conjoined with the ownership of the landing, constituted a ferry property belonging to New York, devoted to public use, and so that it was not taxable. *Id.*

20. Also, *held*, the fact that the city of New York operates the ferry through lessees and derives revenue from the rental, and not by its own operation of the ferry, did not make the franchise or the landing taxable. *Id.*

21. In January, 1883, one S. died, seized of certain real estate which, by his will, he devised to his executor in trust for certain uses and purposes. This trust was, in an action brought by plaintiff, his only child, in November, 1883, adjudged invalid and the lands were held to descend to plaintiff as the testator's sole heir-at-law. At the time of the testator's death the taxes on these lands for several years were unpaid and in May, 1883, a sale was had for the unpaid taxes of 1879. Immediately after obtaining the decree setting aside the trust, plaintiff brought an action to compel defendant, as executor, to pay from the personal property in his hands the taxes remaining unpaid and to redeem the lands from the tax sale. The executor set up as a defense that plaintiff had purchased the lands at a sale in October, 1883, under a decree in an action brought by the widow against the executor, in

his capacity as trustee, for the recovery of her dower, to which plaintiff was not a party, which sale and the conveyance thereunder were made subject to the unpaid taxes and the sale for taxes. It appeared that the testator's personal estate was sufficient to discharge the tax liens, and no claims had been presented to the executor pursuant to his notice of a character entitled to a preference over the taxes imposed and unpaid prior to the testator's death. *Held*, that the taxes were the personal debts of the testator and the executor was not released, by plaintiff's purchase in the dower action and acceptance of the deed, from the obligation imposed upon him by statute (2 R. S. 87, § 27), to pay the same. *Smith v. Cornell.* 554

22. The provision of the act of 1859 "in relation to taxes and assessments in the city of New York" (Laws of 1859, chap. 802, § 8), requiring the commissioners of taxes and assessments to keep the books containing the "annual record of the assessed valuation of real and personal estate" open for examination and correction "from the second Monday of January until the first day of May in each and every year," does not include the day last mentioned; a tax, therefore, is not invalidated by the fact that the books having been kept open through April thirtieth were closed to the public on the first day of May. *Clarke v. Mayor, etc., of New York.* 621

23. Where a tax upon real estate is properly imposed under said act, which is unpaid and a sale is made in conformity to law, any defect in the certificate or lease executed to the purchaser does not impair or affect the sale or authorize him to recover back the purchase-money. This right only exists where the sale is absolutely void for want of jurisdiction. *Id.*

ASSIGNMENT.

1. One of two copartners, by an instrument in writing, conveyed

to G., plaintiff's testator, "all of the property, both real, personal and mixed, owned by him in partnership." G. executed to his assignor an instrument in writing declaring, in substance, that he held the property and its net proceeds in trust for the assignor. The title to certain real estate which had been purchased and paid for by the partnership and for the purposes of its business, was held in the name of the other partner. *Held*, that the assignee could maintain an action for a dissolution of the partnership, a conversion of its assets into money, payment of firm debts, and an accounting between the copartners and determination of their respective interests in any residue of such property; that the assignment conveyed no present interest in specific articles of property, but simply gave the assignee power to procure its conversion into money and the distribution of any residue after payment of firm debts and adjustment of partnership equities in whatever form it might exist; that the assignment, therefore, was not void as being a transfer of real estate in trust for the grantor, but the right transferred was a mere chose in action, subject in respect to its mode of transfer to the rules regulating the disposition of personal property. (Code of Civil Pro. § 1910.) *Greenwood v. Marvin*. 423

2. Also, *held*, that in any event the transfer was valid as against the assignor, and he having been made a party defendant to the action, was bound by any adjudication, and that the copartner or his personal representatives had no such interest in the question as allowed them to contest the validity of the assignment. *Id.*

ATTACHMENT.

1. In an action to recover possession of property alleged to have been wrongfully detained, plaintiff claimed under a bill of sale which the evidence showed was intended as a mortgage. The instrument was not filed as a chattel mortgage.

The property was at the time in store, and was subsequently levied on by defendant's intestate by virtue of an attachment. There was sufficient evidence to justify a finding that it never went into plaintiff's possession prior to the levy under the attachment. *Held*, that as against the attaching creditor the mortgage was void under the statute (Chap. 279, Laws of 1833); that a mere constructive possession would not answer the requirements of the statute. *Siedenbach v. Riley*. 560

2. Also, *held*, that if the instrument was intended as a pledge, there was a similar infirmity in plaintiff's position, as a pledge could not become operative without delivery to the pledgee. *Id.*
3. Also, *held*, that a similar infirmity attaches if the instrument was to be considered as a bill of sale, in the absence of proof that it was made in good faith and without intent to defraud, as the sale not having been accompanied by immediate delivery and followed by a continued change of possession was presumptively fraudulent as against creditors of the vendor. (3 R. S. 186, § 5.) *Id.*

ATTORNEYS.

— *When attorney, who drew a will, prohibited and when permitted to testify on proceeding to probate the will to communications made to him by his client.*

See In re Coleman.

230

Loder v. Whelpley.

239

ATTORNEY AND CLIENT.

1. The simple fact that an attorney who has taken a mortgage for his client and placed it on record, had previously taken for another client a mortgage on the premises which was not recorded, does not charge the junior mortgagee with knowledge of the existence of the prior mortgage; it must be made to appear clearly that the

attorney at the time of the execution and delivery of the second mortgage had in mind the existence of the prior one, and not only this, but also that he knew it was still an existing and valid lien. If he did recollect that the prior mortgage was executed, but honestly believed that it was then or had been satisfied, although mistaken on that point, the second mortgagee would not be charged with notice of its existence. *Constant v. University of Rochester.* 604

2. As to whether, where in such a case the attorney had knowledge of the existence of the prior mortgage, and had it in his possession, and was charged with the duty of having it recorded, and so the duties he owed his two principals were conflicting, the second principal would be charged with the knowledge of the agent, *quære.* *Id.*

AWARD.

The award of an arbitrator cannot be set aside for mere errors of judgment as to the law or facts. If the arbitrator keeps within his jurisdiction and is not guilty of fraud, corruption or other misconduct affecting his award, it is unassailable. *Masury v. Whiton.* 679

BANKS AND BANKING.

1. After commissioners were appointed to complete the New York court-house, under the act of 1870 (§ 11, chap. 362, Laws 1870), they appointed a treasurer, who applied to defendant to make advances to and for the use of the commissioners. This, after its president had consulted with the city comptroller and mayor and had been advised by them that it was proper and right, it agreed to, and did make advances upon checks drawn by said treasurer. No other advances were made to any county commissioners and no other claim for advances to the county was presented under the act. *Held*, that, although the commissioners were not authorized to take the ad-
- vances on the credit of the county and the defendant was chargeable with notice thereof, they were ratified by the act of 1872 (chap. 9, Laws of 1872), and the city was thereby made liable therefor. *Mayor, etc., v. Tenth Nat. Bank.* 446
2. All of the checks were drawn ostensibly to pay bills and expenses incurred by the commissioners in the construction of the court-house. It appeared that a fraudulent conspiracy had been entered into by and between the treasurer, another of the commissioners, the comptroller and others, by which certain of the bills were to be raised above their true amount and the excess was to be divided between the conspirators. A portion of the advances made by defendant were upon checks in payment of bills so raised. This conspiracy was unknown to the other commissioners, and defendant's president, who was the sole agent and representative of the bank, in making the advances had no knowledge or notice of the conspiracy or the misappropriation. It was customary for the city banks to make advances to the various departments and commissioners in anticipation of appropriations. *Held*, the fact that part of the advances were so misappropriated did not deprive defendant of the right to recover the same. *Id.*
3. It appeared that three of the conspirators were directors of the defendant. Neither of them were present at any meeting of the board of directors when action was taken in reference to the advances, and in no way acted for the bank in the transactions. *Held*, that defendant was not chargeable with notice of the fraud or precluded from claiming the benefit of good faith on its part; that, under the circumstances, knowledge which the directors who were engaged in the conspiracy had could not be attributed to it. *Id.*

BEQUESTS.

See WILLIS.

BILL OF PARTICULARS.

1. In an action for the wrongful detention and conversion of personal property, defendant's answer denied the conversion and alleged that plaintiff placed the property with him under an arrangement and with power to use and invest it in transactions on joint account, and that heavy losses were incurred in the course of defendant's management of the estate, of all of which plaintiff had knowledge and was furnished with statements. No affirmative relief was asked by defendant. An application for a bill of particulars of the losses, referred to in defendant's answer, was granted. *Held*, no error; that defendant by setting up the losses in his answer was estopped from denying their materiality on the motion; and that the granting of the motion rested in the discretion of the court. *Cunard v. Francklyn*. 511
2. The power of the court to order either plaintiff or defendant to furnish a bill of particulars extends to all descriptions of actions, and the scope of the order is ordinarily a question of discretion, and so not reviewable on appeal. *Id.*

BOND.

1. The sureties upon an administrator's bond are his privies, and so are precluded from questioning any lawful order made by the surrogate in proceedings wherein the administrator is a party, if obtained without collusion between him and the next of kin or creditors of the estate. *Deobold v. Oppermann*. 581
2. A decree, therefore, of a surrogate setting aside, on the ground of fraud, a decree rendered on the final accounting of an administrator, which by its terms discharged the sureties, and ordering a further accounting, is binding on the sureties, although they were not served with notice of the application; and the omission to give notice is no defense to an action brought pursuant to an order of the surrogate directing the prosecution of the bond because of the failure of the administrator to pay over a sum directed, on a further accounting, to be paid by him to one of the next of kin. *Id.*
3. Nor is it any defense that, pursuant to an agreement made with them at the time the sureties executed the bond, the administrator deposited with them the proceeds of the estate, to be retained until they were discharged from liability on the bond, and with the authority to use the proceeds in their business, they paying interest, and that upon the rendition of the decree discharging them they paid over the amount so deposited. *Id.*
4. Such a contract is invalid and gives the sureties no right to retain funds received by virtue of it, and it seems an action could be maintained against them by the administrator to reclaim the funds, in case of refusal to pay them over. *Id.*
5. The object of an administrator's bond is to relieve the next of kin from the necessity of resorting to the personal liability of a dishonest negligent or absconding administrator, and so it is the duty of the sureties, not that of the next of kin, to pursue the administrator for money of the estate improperly retained by him. *Id.*
6. When an administrator obtains by fraud a decree awarding the funds of the estate to him and canceling his bond, this, in itself, is a breach of the covenant of the bond that he will faithfully execute his trust, and renders the sureties liable; they cannot stand as innocent parties in relation to an act which they have covenanted shall never be performed. *Id.*

CANALS.

Upon hearing of a claim presented by B. to the Board of Claims these facts appeared. Prior to 1840 there was a sewer in J. street in the city of

U., constructed by or under the authority of the city, into which the owners of lots adjoining the street drained their respective lots. In that year the state constructed a sewer in said street for the purpose of conducting the water from a weigh-lock on the Erie canal, and took up the old sewer. Those engaged in the construction of the state sewer requested the adjoining lot owners to point out places where they desired openings to be left in the sewer so that their drains could be connected therewith. In compliance with this request the complainant, who owned an adjoining lot, pointed out the places for such openings opposite his lot. The openings were left accordingly and through them the claimant thereafter drained his lot. Since the construction of the state sewer there has been no other sewer in the street or any other means by which the lots could be drained. In 1876 the state sewer became obstructed by deposits therein, causing the water to set back into the basement of a store on the claimant's premises. He gave the superintendent of the canal notice of this occurrence, requesting him to close the gate at the weigh-lock. This request was not complied with, and no action was taken on the part of the state to repair the sewer or remove the obstructions. Thereafter the water from the sewer again came into the basement, doing the damage complained of. The board decided that the claimant was not entitled to any damages. *Held*, error; that the state was bound to use reasonable care in keeping the sewer in repair, and in its management; and for damages caused by a neglect to perform this duty it was properly chargeable. *Ballou v. State*. 496

CASES REVERSED, DISTINGUISHED, ETC.

People v. O'Brien (45 Hun, 519), reversed. *People v. O'Brien*. 1
Greenwood v. Freight Co. (103 U. S. 18), distinguished. *People v. O'Brien*. 53

People v. G. M. L. Ins. Co. (91 N. Y. 174), distinguished. *People v. O'Brien*. 54
E. & N. E. R. R. Co. v. Casey (26 Penn. St. 287), distinguished. *People v. O'Brien*. 54
Leasure v. Hillegas (7 S. & R. 313), distinguished. *In re McGraw*. 97
Baird v. Bank of Washington (11 S. & R. 411), distinguished. *In re McGraw*. 97
Gouldie v. N. W. Co. (7 Penn. St. 233), distinguished. *In re McGraw*. 98
Runyan v. Coster (14 Pet. 122), distinguished. *In re McGraw*. 98
Smith v. Sheeley (12 Wall. 358), distinguished. *In re McGraw*. 99
Bogardus v. Trinity Church (4 Sandf. Ch. 633), distinguished. *In re McGraw*. 100
Humbert v. Trinity Church (24 Wend. 587), distinguished. *In re McGraw*. 101
DeCamp v. Dobbins (29 N. J. Eq. 86; 81 id. 671), distinguished. *In re McGraw*. 101
Davis v. O. C. R. R. Co. (181 Mass. 258), distinguished. *In re McGraw*. 102
Vidal v. Girard's Exrs. (2 How. [U. S.] 127), distinguished. *In re McGraw*. 104
In re N. Y. E. R. R. Co. (70 N. Y. 327), distinguished. *In re McGraw*. 106
Moore v. B. C. R. R. Co. (108 N. Y. 98), distinguished. *In re McGraw*. 106
Byam v. Collins (39 Hun, 204), reversed. *Byam v. Collins*. 143
Todd v. Hawkins (8 C. & P. 88), distinguished. *Byam v. Collins*. 157
Schettler v. Smith (41 N. Y. 328), distinguished. *Van Brunt v. Van Brunt*. 185

Butler v. Johnson (41 Hun, 206), reversed. *Butler v. Johnson*. 204

Byrne v. N. Y. C. & H. R. R. Co. (104 N. Y. 362), distinguished. *Morris v. Brown*. 327

Weinhold v. Acker (17 J. & S. 182), distinguished. *Morris v. Brown*. 327

Wandell v. Baxter (12 Gray, 494), distinguished. *Morris v. Brown*. 327

Ackert v. Lansing (59 N. Y. 646), distinguished. *Morris v. Brown*. 327

Beck v. Carter (68 N. Y. 283), distinguished. *Morris v. Brown*. 328

Huwer v. Dannenhoffer (82 N. Y. 490), distinguished. *Merry v. Hoopes*. 423

Hazard v. Caswell (93 N. Y. 259), distinguished. *Merry v. Hoopes*. 423

Greenwood v. Holbrook (42 Hun, 633), reversed. *Greenwood v. Holbrook*. 463

Reilly v. Mayor, etc. (23 J. & S. 463), reversed. *Reilly v. Mayor, etc.* 473

In re Anderson (109 N. Y. 554), distinguished. *Reilly v. Mayor, etc.* 477

Weston v. N. Y. E. R. R. Co. (73 N. Y. 595), distinguished. *Pulmer v. Penn. Co.* 493

Sherry v. Cary (23 J. & S. 253), reversed. *Sherry v. Cary*. 514

Angevine v. Jackson (103 N. Y. 470), limited and distinguished. *Burger v. Burger*. 530

Smith v. Cornell (19 J. & S. 354), reversed. *Smith v. Cornell*. 554

Hopkins v. Lott (42 Hun, 442), reversed. *Hopkins v. Lott*. 577

Constant v. University of Rochester (22 J. & S. 515), reversed. *Constant v. University of Rochester*. 604

C. S. R. Co. v. Gebhard (109 U. S. 527), distinguished. *Hollister v. Stewart*. 660

CAUSE OF ACTION.

1. Where an executor, having a power of sale of the testator's real estate, to pay debts, is taking steps to execute the power for the purpose of paying debts which are outlawed, those who have succeeded to the testator's title may maintain an action to restrain such sale, as it would place a cloud upon their title. *Butler v. Johnson*. 204

2. One of two copartners, by an instrument in writing, conveyed to G., plaintiff's testator, "all of the property, both real, personal and mixed, owned by him in partnership." G. executed to his assignor an instrument in writing declaring, in substance, that he held the property and its net proceeds in trust for the assignor. The title to certain real estate which had been purchased and paid for by the partnership and for the purposes of its business, was held in the name of the other partner. Held, that the assignee could maintain an action for a dissolution of the partnership, a conversion of its assets into money, payment of firm debts, and an accounting between the copartners and determination of their respective interests in any residue of such property; that the assignment conveyed no present interest in specific articles of property, but simply gave the assignee power to procure its conversion into money and the distribution of any residue after payment of firm debts and adjustment of partnership equities in whatever form it might exist; that the assignment, therefore, was not void as being a transfer of real estate in trust for the grantor, but the right transferred was a mere chose in action, subject in respect to its mode of transfer to the rules regulating the disposition of personal property. (Code of Civil Pro. § 1910.) *Greenwood v. Marvin*. 423

3. Where a bond and mortgage was executed without consideration, and M., plaintiff's testator, purchased the same for less than its

face, but in good faith and in reliance upon representations on the part of the mortgagor and mortgagee that the securities were valid, given upon a full consideration and free from usury, and where, in an action to foreclose the mortgage the judgment decreed a sale but only to satisfy the sum actually advanced, *held*, that an action was not maintainable against the mortgagor and mortgagee to recover, because of the fraud, the difference between the value of the mortgage as represented and its actual value to the assignee. *Milner v. Zeimer*. 441

Right to maintain action against the city of New York to recover back purchase-money paid on sale of land for unpaid taxes only exists where sale was absolutely void for want of jurisdiction.

See Clarke, etc., v. Mayor, etc. 621

CHALLENGE (OF JURORS).

1. The trial of an indictment for murder having been set down for a particular day the court ordered an adjourned term to be held on that day, and directed a specified number of trial jurors to be summoned to attend. These were drawn and summoned in the usual manner, and the court, because of their service during the four weeks session preceding, discharged the original panel from further attendance. *Held*, that this furnished no ground for a challenge "to the array and the panel of jurors:" that it was within the power of the court to excuse one or all of the jurors originally summoned and to summon any number of others it deemed necessary. (Code Crim. Pro. §§ 858, 861; Code Civil Pro. §§ 84, 1033, 1058.) *People v. Jackson*. 362

2. *It seems* that if the dismissal of the regular panel was erroneous, this was not a ground for a challenge to the panel. (Code Crim. Pro. § 361.) *Id.*

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

1. In an action for the wrongful detention and conversion of personal property, defendant's answer denied the conversion and alleged that plaintiff placed the property with him under an arrangement and with power to use and invest it in transactions on joint account, and that heavy losses were incurred in the course of defendant's management of the estate, of all of which plaintiff had knowledge and was furnished with statements. No affirmative relief was asked by defendant. An application for a bill of particulars of the losses, referred to in defendant's answer was granted. *Held*, no error; that defendant by setting up the losses in his answer was estopped from denying their materiality on the motion; and that the granting of the motion rested in the discretion of the court. *Cunard v. Francklyn*. 511

2. Where the complaint in an action to recover possession of personal property contains no averment of a wrongful taking, but simply alleges a wrongful detention, a general denial puts in issue both plaintiff's title and the wrongful detention, and under it defendant may show title in a stranger although he does not connect himself with the title. *Siedenbach v. Riley*. 560

CLOUD ON TITLE.

Where an executor, having a power of sale of the testator's real estate, to pay debts, is taking steps to execute the power for the purpose of paying debts which are outlawed, those who have succeeded to the testator's title may maintain an action to restrain such sale, as it would place a cloud upon their title. *Butler v. Johnson*. 204

CODE OF CIVIL PROCEDURE.

§ 84. *People v. Jackson*. 362

§§ 111, 157. <i>People ex rel. v. Grant.</i>	584
§ 191, subd. 3. <i>Hopkins v. Lott.</i>	577
§§ 340, 481, 488. <i>Gilbert v. York.</i>	544
§§ 755, 757, 758, 759. <i>Lyons v. Park.</i>	350
§§ 829, 884, 835. <i>Loder v. Whelpley.</i>	239
§§ 884, 885, 886. <i>In re Coleman.</i>	220
§§ 1083, 1058. <i>People v. Jackson.</i>	362
1837. <i>In re Bull.</i>	624
1515. <i>Gilman v. Gilman.</i>	265
1819. <i>Butler v. Johnson.</i>	204
§§ 1835, 1836. <i>Hopkins v. Lott.</i>	577
1910. <i>Greenwood v. Marvoin.</i>	423
§§ 2031, 2038. <i>People ex rel. v. Grant.</i>	584
§ 2338. <i>People ex rel. v. Nash.</i>	310
§ 2547. <i>In re Bull.</i>	624
§ 2545. { <i>Loder v. Whelpley.</i>	239
{ <i>Burger v. Burger.</i>	523
§§ 2557, 2558, 2559, 2570. <i>In re Selleck.</i>	284
§§ 2863, subd. 4; 3228, subd. 3. <i>Sherry v. Cary.</i>	514
§§ 2863, 3228, subd. 4; 3229, 3240. <i>Hopkins v. Lott.</i>	577

CODE OF CRIMINAL PROCEDURE.

§§ 280, 284, 293, 294, 295, 358. 361. <i>People v. Jackson.</i>	362
§ 285. <i>People v. Weldon</i>	569

CODE OF PROCEDURE.

§ 77 <i>Butler v. Johnson.</i>	204
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COLLATERAL INHERITANCE ACT.

1. Under the act of 1885 (Chap. 483, Laws of 1885), providing for the taxing of "gifts, legacies and collateral inheritances," the tax is upon the individual, and can be imposed only when the interest devised to each beneficiary exceeds \$500, the limitation provided by the statute (§ 1) *In re Cager.* 343
2. A tax imposed under said act, before the amendment to it of 1887 (Chap 713, Laws of 1887) exempting legacies to adopted children

went into effect, was not affected by the latter act. *Id.*

3. The will of C. gave his residuary estate to his wife M. "to be used and enjoyed and at her disposal during the term of her natural life." One-third of said estate "that may remain" at the decease of his said wife, the testator gave to an adopted daughter during life; the other two-thirds and the remainder of the one-third to four persons named, who were described as "the present heirs" of M. The appraiser appointed by the surrogate to appraise the value of the respective interests for the purpose of taxation reported that, with such a construction, the gifts over had no market-value. *Held*, that, while said gifts were sustainable as valid executory devises and the beneficiaries might eventually take a valuable estate, yet, as this contingency rendered the present appraisable value of such interest incapable of any correct or reasonable approximate valuation, there was no basis for the imposition of a tax. *Id.*

4. Where the present value of the property devised to one, with a limitation over to others upon the happening of some event, which may or may not occur, can be ascertained, a ground for an approximate estimate of the value of the ultimate devise appears, and it may be made; but where the question as to whether any property at all will pass under the limitation over, depends upon the will of the first taker, there is no rule by which its value can be determined. *Id.*

5. As to whether an appraisal of the value of said gifts over for the purposes of taxation may be made if they eventually come to the possession of the beneficiaries when that event occurs, *quære.* *Id.*

COLLEGES.

1. The provision of the Revised Statutes limiting the amount of property which incorporated col-

leges may take and hold by gift, grant or devise (1 R. S. 460, § 36), is not confined to colleges incorporated by the regents of the university under the general laws of the state, but applies also to such an incorporation created by special charter, unless inconsistent provisions are to be found in the charter. *In re McGraw.* 66

2. The provisions of the act of 1840 (Chap. 318, Laws of 1840) as amended in 1841 (Chap. 261, Laws of 1841), authorizing the creation of trusts to incorporated colleges, by grants, devises or bequests, do not repeal or affect the general law limiting the amount of property which may be taken and held by such a corporation. *Id.*
3. The distinction between the taking and holding of property by corporations recognized in relation to English corporations, subject to the mortmain laws of that country, is not applicable in this state. *Id.*
4. Where, in a special charter granted to an institution of learning, a limitation is put upon its power to hold property, in the absence of some plain and controlling circumstance showing a contrary legislative intent, it must be construed as limiting the taking, as well as holding beyond the amount specified; and a devise or bequest to it, exceeding the amount or value it is permitted to take, is void for the excess. *Id.*
5. Accordingly *held*, that the provision of the charter of Cornell University (§ 5, chap. 585, Laws of 1865), declaring that the corporation thereby created might hold property "not exceeding \$5,000,000 in the aggregate," prohibited its taking, as well as holding beyond that amount; and, it appearing that the university already held property up to the limit, that a bequest to it was void; also, *held*, that the heirs or next of kin of the testatrix could raise the question. *Id.*
6. Also, *held*, that the question was not affected by the fact that subsequent to the death of the testatrix the limitation on the power of said

university to take was removed by the legislature. *Id.*

7. This state having, by act of its legislature (Chap. 460, Laws of 1863), accepted the grant of land made to it by the act of congress "donating the public lands to the several states and territories which may provide colleges for the benefit of agriculture and the mechanic arts" (Chap. 180, U. S. Laws, 1862), as a compliance on its part with one of the conditions of the grant, chartered said university. In the charter the income, revenue and avails received from the investment of the proceeds of the sale of the land scrip were appropriated to the university, and were to be paid over to its trustees. In 1866 the legislature passed an act (Chap. 481, Laws of 1866), authorizing the comptroller to sell the scrip at not less than thirty cents per acre to the trustees of said university; in case said trustees did not contract for the purchase, then the same was to be sold by the commissioners of the land office to any person or persons. The sale in either case to be on condition and under an agreement with the purchaser that the net avails of the sale of the scrip, or of the lands located under it, should be paid over and devoted to the purposes of said university. The trustees having failed to purchase, said commissioners entered into a contract with C. for the purchase by the latter of the scrip then undisposed of. By the agreement C. contracted to purchase at thirty cents per acre, to be paid on delivery of the scrip, to locate and sell the land and pay the net proceeds, less the amount paid, into the state treasury. From such net proceeds it was agreed that a sum equal to an additional thirty cents per acre should be added to and form part of the fund known as the "College Land Scrip Fund," and that the remainder should constitute a separate fund to be known as the "Cornell Endowment Fund," which should "be the property of the Cornell University," the principal thereof to remain forever unimpaired, the income to be annually appropriated by the legis-

lature and paid over to the trustees of said university. Subsequently, under an agreement between C. and the university, made with the consent of the comptroller and the said commissioners, C. conveyed to the university all the rights and interests he had acquired under the said contract and the university assumed his place. Pursuant to the act of 1880 (Chap. 317, Laws of 1880), directing it, the legislature transferred to the university the moneys and securities constituting the "Cornell Endowment Fund." *Held*, that the agreement between the commissioners and C. was, in effect, a sale by the state of the scrip at thirty cents per acre, with an additional thirty cents, if so much should be realized upon sale by the vendee; and upon the transfer to him he became the legal owner; that the residue of the proceeds agreed to be paid into the state treasury was to be so paid, not as part of the purchase-price, but as profits and as the property of the university; that said agreement was fully authorized by the said act of 1880; that neither said act nor the agreement was in contravention of the act of congress; that the university by the transfer from and its agreement with C., and by receiving the moneys and securities of the Cornell Endowment Fund, by virtue of the act of 1880, became the owner of this fund and was not a debtor of the state on account thereof, and that, therefore, the property which thus came into the possession of the university was held by it within the meaning of its charter, and so was to be included in estimating the amount of property held by it at the time of the bequest. *Id.*

COMMITMENT.

The provision of the Code of Civil Procedure (§ 157), declaring that "a prisoner committed to jail upon process for contempt * * * must be actually confined and detained within the jail," etc., and the provision (§ 111, as amended by Laws of 1886, chap. 672, § 5), providing that "no prisoner shall

be imprisoned within the prison walls of any jail" under a commitment on and fine for contempt for non-payment of alimony or counsel fees in a divorce case, for a longer period than that specified, refer to an actual imprisonment within the walls of a jail, not the technical restraint under which a person is supposed to be who is committed to the custody of his counsel and suffered to go at large. *People ex rel. Clark v. Grant.* 584

CONFLICT OF LAWS.

The remedy against a foreign administrator, in his representative character, to charge the assets of his intestate for a debt or liability of the decedent, is governed by the law of the jurisdiction, and must be pursued in the legal tribunals of the state or country where the decedent resided at the time of his death and where administration was granted *Lyon v. Park.* 350

CONSTITUTIONAL LAW.

1. The B. S. R. Co., a corporation organized under the act of 1884 (chap. 252, Laws of 1884), providing for the organization of street railroad corporations, obtained by resolution of the common council of the city of New York, authority to lay tracks and run cars over Broadway in said city, upon certain terms and conditions prescribed in the resolution, but with no limitation as to time, or power of revocation reserved. The company duly accepted the grant, and fully complied with and performed all of said terms and conditions. It mortgaged its property and franchises as security for contemplated loans, and authorized its bonds, secured by said mortgage, to be sold, and they were purchased by investors without notice of any defect in their origin or execution; it also made traffic contracts with other roads. Thereafter it was dissolved by statute (Chap. 268, Laws of 1886). *Held*, that while the annulling act was

- constitutional and valid, its effect was only to take the life of the corporation; that the corporation took, through its grant from the city, an indefeasible title in the land, necessary to enable it to construct and maintain a street railway in Broadway and to run cars thereon, which constituted property; that all its property, including street rights or franchises, also its mortgages and valid contracts, including the traffic contracts, survived its dissolution; that upon such dissolution its trustees, then in office, became vested with the title to its property under the provisions of the Revised Statutes (1 R. S. 601, §§ 9, 10), as trustees for its creditors and stockholders; that the acts of 1886 (Chap. 271, and chap. 310, Laws of 1886), providing, in case of such a dissolution, for the taking away from the company of its street franchises, and for the winding up of its affairs by suit brought by the attorney-general, and the appointment of a receiver therein, are unconstitutional and void. *People v. O'Brien*. 1
2. Constitutional or statutory provisions for the repeal of statutes, providing for the creation of corporations, or the annulment of charters of corporations, do not confer power to take away or destroy property or annul contracts, and an express reservation in such a statute of power to take away or destroy property lawfully acquired under authority conferred by a charter, and any legislation which authorizes such a result to be accomplished indirectly is unconstitutional and void. *Id.*
3. The provision of the General Railroad Act (§ 43, chap. 140, Laws of 1850), providing that the legislature may annul or dissolve any corporation formed under the act, "but such dissolution shall not take away or impair any remedy given against any such corporation * * * for any liability which shall have been previously incurred," creates the contract between the state and the corporation and regulates the rights of parties upon the exercise by the state of the power of repeal. *Id.*
4. The authority of the legislature in the exercise of its police powers cannot be limited or controlled by the action of a previous legislature, or by the provisions of contracts between individuals or corporations. *B. H. S. R. R. Co. v. B. S. R. R. Co.* 132
5. The parties hereto, two street railroad corporations in the city of B., entered into a contract providing, among other things, for the making by each of connections with the roads of the other "so long as it receives for the transportation of passengers the fare allowed on the 3d of May, 1872, and no longer," and each agreed that it would charge the same rate that it was "permitted to charge by the statutes in force regulating the same" on that day, and would make no change in rates without the consent of the other party. After the making of the contract it was declared by statute (Chap. 600, Laws of 1875), to be unlawful for any street railroad company in B. to charge more than five cents for each passenger, a sum less than that authorized by the statutes in force May 3, 1872. Defendant thereupon reduced its rates of fares to five cents. In an action to recover a penalty fixed by the contract for a breach of the provision as to rates of fare, *held*, that said act was not obnoxious to the constitutional prohibition against passing a law impairing the obligation of contracts. *Id.*
6. *It seems* that the legislature, in the exercise of the police power under the Constitution, had power to pass the act of 1885 (Chap. 454, Laws of 1885), which provides that the "height of all dwelling-houses and of all houses used, or intended to be used as dwellings for more than one family, thereafter to be erected in the city of New York, * * * shall not exceed * * * eighty feet upon all streets and avenues exceeding sixty feet in width." *People ex rel. v. D'Oench*. 359
7. The provision of the act of 1872 (Chap. 9, Laws of 1872), authorizing and directing the comptroller of the city of New York to pay

back to the various banks, etc., of the city all moneys which had been advanced by them "for the use of any of the departments or commissioners of the city or county" was a valid exercise of legislative power and made such advances binding obligations on the city. *Mayor, etc., v. Tenth Nat. Bank.* 446

8. As municipal corporations are creatures of the state and exist and act in subordination of its sovereign power, the legislature may determine what moneys they may raise and expend and what taxation for municipal purposes may be imposed; and so, it may compel such a corporation to pay a claim which has some meritorious basis to rest on. *Id.*

9. The provisions of the "Lewis County Tax Law" (Chap. 158, Laws of 1884, amended by chap. 215, Laws of 1885), declaring that when taxes are assessed on lands and have been returned to the state comptroller or the county treasurer unpaid, it shall cease to be lawful for the owners to peel bark or cut timber on the land or to permit others to do so, and imposing a penalty for a violation of this command, are not obnoxious to the constitutional provisions protecting property rights. *Prentice v. Weston.* 460

10. Upon the return of the taxes as unpaid the sale of the land is the sole remaining resource for the collection of the taxes, and it is competent for the legislature to restrain acts which would strip the land of its chief value and tend to make unavailing the final remedy. *Id.*

11. The legislature may prohibit a use of private property which violates the duty the owner owes to his neighbor or to the state. *Id.*

12. In proceedings by the M. T. Co., under the act creating it (Chap. 833, Laws of 1872), it appeared from the petition that the board constituted by said act to locate the lines of the three branches authorized thereby made the location, and appraisers were asked for in relation to the streets affected, and also

to streets affected by the main line located by the act itself. Subsequently, by order of the court, the petitioners were permitted to have the hearing proceed upon a supplemental petition, by which it appeared that after the passage of the act of 1881 (Chap. 636, Laws of 1881), amending the act of 1872, the board then consisting of different persons from those who composed it when the first location was made, made new locations of the same routes, in many respects, both as to the main route and the branches different from the routes described in the act of 1872 and in the first location. *Held*, that, so far as the "main line" is concerned, neither board had power to name the streets through which it should pass, or change or omit any portion of the line as located by the act; that the company, if it took any part of the franchise as to it, was bound to take it as given, and as to the changed location of that line the court had no jurisdiction; also, that, as the location of the main line could not be sustained, that of the branches fell with it; that if the act of 1881 was intended to give the company rights in streets other than those named in the act of 1872, it was in contravention of the provision of the state Constitution, as amended in 1874, which prohibits any law authorizing the construction of a street railroad, except upon the consent of landowners and the local authorities or the order of the court (art. 8, § 17); that this prohibition applies to a part of as well as to a complete railroad; but *held*, that no such intention was expressed in or could be implied from the act. *In re Met. Transit Co.* 588

CONTEMPT.

1. The provision of the Code of Civil Procedure (§ 157), declaring that "a prisoner committed to jail upon process for contempt * * * must be actually confined and detained within the jail," etc., and the provision (§ 111, as amended by Laws of 1886, chap. 872, § 5), providing that "no prisoner shall

be imprisoned within the prison walls of any jail" under a commitment on and fine for contempt for non-payment of alimony or counsel fees in a divorce case, for a longer period than that specified, refer to an actual imprisonment within the walls of a jail, not the technical restraint under which a person is supposed to be who is committed to the custody of his counsel and suffered to go at large. *People ex rel. Clark v. Grant.* 584

2. The return of the sheriff to a writ of *habeas corpus* issued to inquire into the cause of imprisonment of one imprisoned for contempt in the non-payment of alimony and counsel fees in a divorce case did not affirmatively show that the relator had not been imprisoned for the period specified. Notice of the proceedings was given as required by said Code (§ 2038) to the plaintiff in the action. She appeared and made what was termed a return verified by her affidavit, which stated facts showing that the relator had not been actually confined for the prescribed period; to this he demurred. *Held*, that this was an admission of the facts. *Id.*
3. *It seems* that under the sheriff's return the relator would not have been entitled to his discharge. *Id.*

CONTRACTS

1. The parties hereto, two street railroad corporations in the city of B., entered into a contract providing, among other things, for the making by each of connections with the roads of the other "so long as it receives for the transportation of passengers the fare allowed on the 3d of May, 1872, and no longer," and each agreed that it would charge the same rate that it was "permitted to charge by the statutes in force regulating the same" on that day, and would make no change in rates without the consent of the other party. After the making of the contract it was declared by statute (Chap. 600, Laws of 1875) to be unlawful for any street railroad company in B. to charge more than five cents for

each passenger, a sum less than that authorized by the statutes in force May 8, 1872. Defendant thereupon reduced its rates of fare to five cents. In an action to recover a penalty fixed by the contract for a breach of the provision as to rates of fare, *held*, that said provision contemplated a change of rates made by the voluntary action of the parties alone, not one made by paramount authority; also that by the terms of the contract it was to terminate in case a condition of affairs should arise under which the parties would not be permitted to charge the rates of fare specified; and so, that it terminated on the passage of the said act. *B. E. S. R. R. Co. v. B. S. R. R. Co.* 193

2. In an ante-nuptial agreement, both the parties to which were persons of large means, after clear and definite provisions had been made as to the interest each should take in the property of the other during life and after the death of the other, was contained the following clause: "All the furniture, plate, horses, carriages and other personal property *in use by the parties for family purposes*, at the time of the death of either, shall vest absolutely in the survivor." The parties intermarried, and F., the husband, died first. In an action by the executor of the wife to recover certain personal property, the title to which he claimed became vested in the wife, *held*, that the clause included such property as they both had been accustomed to use in their domestic life, and the continued enjoyment of which was essential to the personal comfort and convenience of those habituated to its daily use; that it did not include property not so in use, or such as was employed for the use and enjoyment of the respective parties individually; nor did it include heir-looms, valuable mainly because of their relation to and association with the family of one of the parties by whose members it had been acquired. *Gorham v. Fillmore.* 251
3. Among the property claimed by plaintiff was a large and very valuable library owned by F. at

lature and paid over to the trustees of said university. Subsequently, under an agreement between C. and the university, made with the consent of the comptroller and the said commissioners, C. conveyed to the university all the rights and interests he had acquired under the said contract and the university assumed his place. Pursuant to the act of 1880 (Chap. 817, Laws of 1880), directing it, the legislature transferred to the university the moneys and securities constituting the "Cornell Endowment Fund." *Held*, that the agreement between the commissioners and C. was, in effect, a sale by the state of the scrip at thirty cents per acre, with an additional thirty cents, if so much should be realized upon sale by the vendee; and upon the transfer to him he became the legal owner; that the residue of the proceeds agreed to be paid into the state treasury was to be so paid, not as part of the purchase-price, but as profits and as the property of the university; that said agreement was fully authorized by the said act of 1880; that neither said act nor the agreement was in contravention of the act of congress; that the university by the transfer from and its agreement with C., and by receiving the moneys and securities of the Cornell Endowment Fund, by virtue of the act of 1880, became the owner of this fund and was not a debtor of the state on account thereof, and that, therefore, the property which thus came into the possession of the university was held by it within the meaning of its charter, and so was to be included in estimating the amount of property held by it at the time of the bequest. *Id.*

COMMITMENT.

The provision of the Code of Civil Procedure (§ 157), declaring that "a prisoner committed to jail upon process for contempt * * * must be actually confined and detained within the jail," etc., and the provision (§ 111, as amended by Laws of 1886, chap. 672, § 5), providing that "no prisoner shall

be imprisoned within the prison walls of any jail" under a commitment on and fine for contempt for non-payment of alimony or counsel fees in a divorce case, for a longer period than that specified, refer to an actual imprisonment within the walls of a jail, not the technical restraint under which a person is supposed to be who is committed to the custody of his counsel and suffered to go at large. *People ex rel. Clark v. Grant.* 584

CONFLICT OF LAWS.

The remedy against a foreign administrator, in his representative character, to charge the assets of his intestate for a debt or liability of the decedent, is governed by the law of the jurisdiction, and must be pursued in the legal tribunals of the state or country where the decedent resided at the time of his death and where administration was granted. *Lyon v. Park.* 350

CONSTITUTIONAL LAW.

1. The B. S. R. Co., a corporation organized under the act of 1884 (chap. 253, Laws of 1884), providing for the organization of street railroad corporations, obtained by resolution of the common council of the city of New York, authority to lay tracks and run cars over Broadway in said city, upon certain terms and conditions prescribed in the resolution, but with no limitation as to time, or power of revocation reserved. The company duly accepted the grant, and fully complied with and performed all of said terms and conditions. It mortgaged its property and franchises as security for contemplated loans, and authorized its bonds, secured by said mortgage, to be sold, and they were purchased by investors without notice of any defect in their origin or execution; it also made traffic contracts with other roads. Thereafter it was dissolved by statute (Chap. 268, Laws of 1886). *Held*, that while the annulling act was

- constitutional and valid, its effect was only to take the life of the corporation; that the corporation took, through its grant from the city, an indefeasible title in the land, necessary to enable it to construct and maintain a street railway in Broadway and to run cars thereon, which constituted property; that all its property, including street rights or franchises, also its mortgages and valid contracts, including the traffic contracts, survived its dissolution; that upon such dissolution its trustees, then in office, became vested with the title to its property under the provisions of the Revised Statutes (1 R. S. 601, §§ 9, 10), as trustees for its creditors and stockholders; that the acts of 1886 (Chap. 271, and chap. 310, Laws of 1886), providing, in case of such a dissolution, for the taking away from the company of its street franchises, and for the winding up of its affairs by suit brought by the attorney-general, and the appointment of a receiver therein, are unconstitutional and void. *People v. O'Brien*. 1
2. Constitutional or statutory provisions for the repeal of statutes, providing for the creation of corporations, or the annulment of charters of corporations, do not confer power to take away or destroy property or annul contracts, and an express reservation in such a statute of power to take away or destroy property lawfully acquired under authority conferred by a charter, and any legislation which authorizes such a result to be accomplished indirectly is unconstitutional and void. *Id.*
 3. The provision of the General Railroad Act (§ 48, chap. 140, Laws of 1850), providing that the legislature may annul or dissolve any corporation formed under the act, "but such dissolution shall not take away or impair any remedy given against any such corporation * * * for any liability which shall have been previously incurred," creates the contract between the state and the corporation and regulates the rights of parties upon the exercise by the state of the power of repeal. *Id.*
 4. The authority of the legislature in the exercise of its police powers cannot be limited or controlled by the action of a previous legislature, or by the provisions of contracts between individuals or corporations. *B. E. S. R. R. Co. v. B. S. R. R. Co.* 182
 5. The parties hereto, two street railroad corporations in the city of B., entered into a contract providing, among other things, for the making by each of connections with the roads of the other "so long as it receives for the transportation of passengers the fare allowed on the 3d of May, 1872, and no longer," and each agreed that it would charge the same rate that it was "permitted to charge by the statutes in force regulating the same" on that day, and would make no change in rates without the consent of the other party. After the making of the contract it was declared by statute (Chap. 600, Laws of 1875), to be unlawful for any street railroad company in B. to charge more than five cents for each passenger, a sum less than that authorized by the statutes in force May 3, 1872. Defendant thereupon reduced its rates of fares to five cents. In an action to recover a penalty fixed by the contract for a breach of the provision as to rates of fare, *held*, that said act was not obnoxious to the constitutional prohibition against passing a law impairing the obligation of contracts. *Id.*
 6. *It seems* that the legislature, in the exercise of the police power under the Constitution, had power to pass the act of 1885 (Chap. 454, Laws of 1885), which provides that the "height of all dwelling-houses and of all houses used, or intended to be used as dwellings for more than one family, thereafter to be erected in the city of New York, * * * shall not exceed * * * eighty feet upon all streets and avenues exceeding sixty feet in width." *People ex rel. v. D'Oench*. 359
 7. The provision of the act of 1872 (Chap. 9, Laws of 1872), authorizing and directing the comptroller of the city of New York to pay

back to the various banks, etc., of the city all moneys which had been advanced by them "for the use of any of the departments or commissioners of the city or county" was a valid exercise of legislative power and made such advances binding obligations on the city. *Mayor, etc., v. Tenth Nat. Bank.* 446

8. As municipal corporations are creatures of the state and exist and act in subordination of its sovereign power, the legislature may determine what moneys they may raise and expend and what taxation for municipal purposes may be imposed; and so, it may compel such a corporation to pay a claim which has some meritorious basis to rest on. *Id.*

- 9 The provisions of the "Lewis County Tax Law" (Chap. 153, Laws of 1884, amended by chap. 215, Laws of 1885), declaring that when taxes are assessed on lands and have been returned to the state comptroller or the county treasurer unpaid, it shall cease to be lawful for the owners to peel bark or cut timber on the land or to permit others to do so, and imposing a penalty for a violation of this command, are not obnoxious to the constitutional provisions protecting property rights. *Prentice v. Weston.* 480

10. Upon the return of the taxes as unpaid the sale of the land is the sole remaining resource for the collection of the taxes, and it is competent for the legislature to restrain acts which would strip the land of its chief value and tend to make unavailing the final remedy. *Id.*

11. The legislature may prohibit a use of private property which violates the duty the owner owes to his neighbor or to the state. *Id.*

12. In proceedings by the M. T. Co., under the act creating it (Chap. 883, Laws of 1872), it appeared from the petition that the board constituted by said act to locate the lines of the three branches authorized thereby made the location, and appraisers were asked for in relation to the streets affected, and also

to streets affected by the main line located by the act itself. Subsequently, by order of the court, the petitioners were permitted to have the hearing proceed upon a supplemental petition, by which it appeared that after the passage of the act of 1881 (Chap. 636, Laws of 1881), amending the act of 1872, the board then consisting of different persons from those who composed it when the first location was made, made new locations of the same routes, in many respects, both as to the main route and the branches different from the routes described in the act of 1872 and in the first location. *Held*, that, so far as the "main line" is concerned, neither board had power to name the streets through which it should pass, or change or omit any portion of the line as located by the act; that the company, if it took any part of the franchise as to it, was bound to take it as given, and as to the changed location of that line the court had no jurisdiction; also, that, as the location of the main line could not be sustained, that of the branches fell with it; that if the act of 1881 was intended to give the company rights in streets other than those named in the act of 1872, it was in contravention of the provision of the state Constitution, as amended in 1874, which prohibits any law authorizing the construction of a street railroad, except upon the consent of landowners and the local authorities or the order of the court (art. 3, § 17); that this prohibition applies to a part of as well as to a complete railroad; but *held*, that no such intention was expressed in or could be implied from the act. *In re Met. Transit Co.* 588

CONTEMPT.

1. The provision of the Code of Civil Procedure (§ 157), declaring that "a prisoner committed to jail upon process for contempt * * * must be actually confined and detained within the jail," etc., and the provision (§ 111, as amended by Laws of 1886, chap. 672, § 5), providing that "no prisoner shall

be imprisoned within the prison walls of any jail" under a commitment on and fine for contempt for non-payment of alimony or counsel fees in a divorce case, for a longer period than that specified, refer to an actual imprisonment within the walls of a jail, not the technical restraint under which a person is supposed to be who is committed to the custody of his counsel and suffered to go at large. *People ex rel. Clark v. Grant.* 584

2. The return of the sheriff to a writ of *habeas corpus* issued to inquire into the cause of imprisonment of one imprisoned for contempt in the non-payment of alimony and counsel fees in a divorce case did not affirmatively show that the relator had not been imprisoned for the period specified. Notice of the proceedings was given as required by said Code (§ 2038) to the plaintiff in the action. She appeared and made what was termed a return verified by her affidavit, which stated facts showing that the relator had not been actually confined for the prescribed period; to this he demurred. *Held*, that this was an admission of the facts. *Id.*
3. *It seems* that under the sheriff's return the relator would not have been entitled to his discharge. *Id.*

CONTRACTS

1. The parties hereto, two street railroad corporations in the city of B., entered into a contract providing, among other things, for the making by each of connections with the roads of the other "so long as it receives for the transportation of passengers the fare allowed on the 3d of May, 1872, and no longer" and each agreed that it would charge the same rate that it was "permitted to charge by the statutes in force regulating the same" on that day, and would make no change in rates without the consent of the other party. After the making of the contract it was declared by statute (Chap. 600, Laws of 1875) to be unlawful for any street railroad company in B. to charge more than five cents for

each passenger, a sum less than that authorized by the statutes in force May 3, 1872. Defendant thereupon reduced its rates of fare to five cents. In an action to recover a penalty fixed by the contract for a breach of the provision as to rates of fare, *held*, that said provision contemplated a change of rates made by the voluntary action of the parties alone, not one made by paramount authority; also that by the terms of the contract it was to terminate in case a condition of affairs should arise under which the parties would not be permitted to charge the rates of fare specified; and so, that it terminated on the passage of the said act. *B. E. S. R. R. Co. v. B. S. R. R. Co.* 182

2. In an ante-nuptial agreement, both the parties to which were persons of large means, after clear and definite provisions had been made as to the interest each should take in the property of the other during life and after the death of the other, was contained the following clause: "All the furniture, plate, horses, carriages and other personal property *in use by the parties for family purposes*, at the time of the death of either, shall vest absolutely in the survivor." The parties intermarried, and F., the husband, died first. In an action by the executor of the wife to recover certain personal property, the title to which he claimed became vested in the wife, *held*, that the clause included such property as they both had been accustomed to use in their domestic life, and the continued enjoyment of which was essential to the personal comfort and convenience of those habituated to its daily use; that it did not include property not so in use, or such as was employed for the use and enjoyment of the respective parties individually; nor did it include heir-looms, valuable mainly because of their relation to and association with the family of one of the parties by whose members it had been acquired. *Gorham v. Fillmore.* 251
3. Among the property claimed by plaintiff was a large and very valuable library owned by F. at

his decease, the collection of which had occupied his lifetime. He had held the office of President of the United States, and, during his incumbency of that office large additions to the library were made, more or less associated with the office. *Held*, that the library did not pass to the wife under the clause in question. *Id.*

4. F. owned a quantity of silverware, which had been kept in a box in a safe, and which was marked with the initials of F. and other members of his family, and other silverware purchased by his first wife with the proceeds of a present made to her while she occupied the presidential mansion, none of which had been in ordinary use, but was kept in store by themselves. On one or two occasions of public receptions a few of the pieces of plate had been used to decorate the tables and rooms. *Held*, that this silverware was not included in the contract. *Id.*

5. So, also, *held*, as to a quantity of wines acquired by F. while he was president, none of which, so far as appeared, had ever been used for family purposes. *Id.*

6. So, also, *held*, as to trunks bought and used by F. individually, and other personal property which had, for a long time, been excluded from the house and had not been in use. *Id.*

7. It is a presumption of law, in the absence of express words, that the parties to a contract intend to bind not only themselves, but their personal representatives. *Kernochan v. Murray.* 306

8. Defendants were engaged, under a contract with the aqueduct commissioners of the city of New York, in excavating for a tunnel. By their contract they were bound to furnish "all facilities for the purpose of inspection." M., defendant's intestate, was a civil engineer in the employ of the commissioners. It was his duty to inspect the work to see that it was done in compliance with the contract. For the purpose of removing the ma-

terial excavated defendants employed "dump cars" running on a track laid in the shaft. The cars were drawn out by a cable and returned by gravitation, their downward speed being regulated by a brake. They were not intended as facilities for taking persons down the shaft, or fitted for that purpose. M., who was riding on the outside of one of these cars down the shaft, to where the work of excavation was going on, through the neglect of the brakeman in charge of the car to control its velocity, was thrown from the car and killed. In an action to recover damages, it appeared that there was plenty of room in the shaft to go on foot up and down it, and there was no obstruction in the way of the engineer's proceeding to the work on foot; that while M. had been accustomed, with the consent of the brakeman, to so ride down, it did not appear that this was with the knowledge of the defendants, or that the brakeman had any authority to give his consent. It also appeared that other engineers employed in the work of inspection usually although not always, walked up and down the shaft. *Held*, that no duty or obligation rested upon defendants to transport M. into the tunnel or to allow such a use of their car by him, or to manage it with such care as to prevent injury to him when riding thereon; that no license could be implied by such former use of the cars; that the decedent took upon himself the risk, both as to the condition of the cars and the quality and care of the brakeman; and that, therefore, a refusal to nonsuit was error. *Morris v. Brown.* 318

9. Plaintiff received two policies of insurance upon his life issued by defendant, giving his notes and a check for the premiums, under an agreement with defendant's agent that certain policies then held by plaintiff in other companies, and which were delivered by him to said agent, should be surrendered by the latter to the insurers and their surrender value paid in cash, or paid-up policies obtained therefor, the amount in either case to

be satisfactory to plaintiff. In case of the agent's failure to make arrangements for surrender, satisfactory to plaintiff, it was agreed the latter could return the policies and receive back his notes and check. The policies contained provisions to the effect that no agent of the company had power to make or modify the contract of insurance or to bind it by any promise. The agent failed to effect a surrender of the old policies satisfactory to plaintiff, and, on refusal of defendant to receive back his policies and surrender the notes and check, he brought suit to compel such surrender. *Held*, that said provisions in the policies related to the policies themselves after they became executed instruments between the parties; that the agreement with the agent as to a surrender of the old policies was a condition precedent to the full delivery and acceptance of defendant's policies, and until fully complied with or waived no valid contract of insurance existed; and, therefore, that said provisions did not apply; that it was immaterial whether the agent had power to make a conditional delivery or not, as plaintiff had power to attach such conditions as he chose to the acceptance, and if the agent lacked the power, the result would still be that there was no absolute acceptance, and so no contract; and that, therefore, plaintiff was entitled to the relief sought. *Harnickell v. N. Y. L. Ins. Co.* 890

10. One G. died leaving a widow, two daughters and two sons. By his will he gave to his widow "the net income of his estate," real and personal, for life or until she again married. Upon her remarriage the rents, profits, income and interest were during the remainder of her life to be divided between the widow, the daughters and sons, each class to take one-third, and in case of the death of either of the sons or daughters his or her issue were to take the parent's share, and if there was no issue the surviving son or daughter was to take that share. Upon the widow's death the property was to be divided among the chil-

dren, each to hold the share given during life, and after the death of either the share of the one so dying went to his or her lawful children and to the lawful issue of every child who may have died. In case of the death of either son or daughter without issue the share went to the other son or daughter. The daughters opposed probate of the will, but withdrew their opposition upon an agreement, declared by its terms to be binding on the parties to it "and their respective heirs, executors and administrators," made between the widow, the children of the testator and the husbands of the two daughters, by which she covenanted during widowhood to pay over to each of the children, and in case of the death of either, to his or her "legal representatives," one-eighth of the net income of all the testator's real and personal estate. One of the daughters died leaving a husband and no issue her surviving, also leaving a will, by which she appointed her husband executor and gave him all her property, including her interest in her father's estate. The husband died and his executors claimed the share of the income to which, if living, the wife of their testator would have been entitled under the will of her father. In an action to have the rights of the parties under said agreement determined, *held*, that the term "legal representatives" used in said agreement had the same meaning as the similar terms used in the statute of distribution (2 R. S. 96, § 75), i. e., children or their lineal descendants and not executors or administrators; that the general provisions of the will of G. and the scheme of the statute, so far as they relate to or point out the beneficiary or distributee, are the same; that the agreement is to be read as if the provisions of the will, as modified by it, were incorporated in it, and its only effect is to give to the testator's children a larger share of the testator's estate than they would have received under his will, but to be distributed in the same way, and so there being no legal representatives the next of

- kin of the deceased daughter were entitled to her share. *Greenwood v. Holbrook*. 465
11. In an action brought to recover an amount claimed by plaintiff to be due him for work done and materials furnished under a contract to regulate and grade a street in the city of New York, the defendant averred in its answer that, upon the estimated quantities of the work to be done, plaintiff was the lowest bidder, but that by reason of "the inadvertence, ignorance, carelessness or error of the surveyor" an error arose whereby the contract, as awarded to plaintiff, required a payment of nearly twice the actual value of the work; that plaintiff, prior to making his bid, knew that the estimate misstated certain items and in bad faith, and with intent to profit by the ignorance of the surveyor, made an unbalanced bid. There was no allegation or proof of a fraudulent collusion between plaintiff and the officers of the corporation. The city surveyor testified on the trial that he made his estimates from surface indications and as correctly as he could, but that the nature of the locality was such that any estimate in advance was unreliable. *Held*, that no fraud was established on the part of plaintiff and he was entitled to recover; that he had a right to the benefit of his own knowledge honestly acquired, so long as he did nothing to mislead or deceive the city; that it having invited bids upon the basis of the estimates made, and awarded the contract to one who was the lowest bidder, tested by the proposals, it could not hold the contractor to a performance and then annul the contract because the actual result so varies from the estimates as to make the accepted bid higher than the others; that the lowest bidder under the estimates is the lowest bidder under the law, and he does not lose his right because the estimates are erroneous; that having complied with the law and entered into the contract the city could not urge against him its own ignorance or error. *Reilly v. Mayor, etc.* 478
12. The validity of such a contract with the city does not depend upon the accuracy of the officer charged with the duty of making the estimates, but upon an honest effort on his part to be accurate. *Id.*
13. P., plaintiff's intestate, prepared the general plans and specifications for the construction of a house for defendants under an oral agreement between them. After all the work called for had been done and payments had been made thereon, a writing was signed by the parties in which, after an acknowledgment of receipt by P. of the amount paid, it was stated that this left "a balance due" of a sum stated, which defendants agreed to pay in installments, the last installment when the roof was on. It was then added that this should "be in full for all services for plans of exterior and floor plans on the building." In an action to recover a balance, alleged to be due, defendants claimed that the writing constituted a contract, by which P. agreed to do all the work necessary for finishing the exterior and floor plans, and that this included a detailed drawing and specifications, and set up as a counter-claim a breach of performance of this contract. *Held*, that the claim was untenable; that the writing amounted simply to a receipt, a promise by defendants to pay the balance then due as specified, and by P. that this should be in full for the work he had then performed; that the balance being then due and the agreement by P. to wait for payment being without consideration was void; but that if valid, it appearing that defendants had not made the payments as agreed, although the action was commenced before the roof was on, but after default on their part, this was no bar to the prosecution of the action. *Pfeiffer v. Campbell*. 631

CORPORATIONS.

1. Constitutional or statutory pro-

visions for the repeal of statutes, providing for the creation of corporations, or the annulment of charters of corporations, do not confer power to take away or destroy property or annul contracts, and an express reservation in such a statute of power to take away or destroy property lawfully acquired, under authority conferred by a charter, and any legislation which authorizes such a result to be accomplished indirectly is unconstitutional and void. *People v. O'Brien*. 1

2. As to whether an action by the attorney-general in the name of the People of the state, for the purpose of determining the rights and liabilities of parties, as affected by the dissolution of a corporation, is maintainable, *quære*. *Id.*

See COLLEGES.

INSURANCE (LIFE).

MUNICIPAL CORPORATIONS.

RAILROAD CORPORATIONS.

COSTS.

1. Under the Code of Civil Procedure (§§ 2557-2559, 2570), it is within the discretion of a surrogate, upon the settlement of the accounts of an executor or testamentary trustee to award costs "payable by the party personally or out of the estate or fund as justice requires;" and, while the exercise of this discretion is so qualified by the words "as justice requires" as to authorize the interposition of the General Term, where there has been an abuse of discretion and a violation of justice, it has no other power of review. *In re Selleck*. 284

2. Plaintiff's complaint in an action in a court of record contained seven causes of action, aggregating \$552.50, besides interest. The answer, besides a general denial, set up two counter-claims, aggregating \$561.26, besides interest. These grew out of transactions in no way connected with plaintiff's causes of action, and had not in any way been applied by the parties in re-

duction of plaintiff's claim. Upon the trial the parties gave evidence in support of each of their respective claims. The jury brought in special findings for the plaintiff on three of the causes of action amounting to \$657.84, and for defendant on one of his counter-claims \$634.26; balance in favor of plaintiff \$23.59. Under the direction of the trial court they rendered a general verdict for the plaintiff for \$23.59. *Held*, that the causes of action and counter-claim so established were subsisting accounts between the parties within the meaning of the provision of the Code of Civil Procedure (§ 2863, subd. 4), declaring that a justice of the peace shall not take cognizance of a civil action "where in a matter of account, the sum total of the accounts of both parties, proved to the satisfaction of the justice, exceeds \$400," and as, therefore, the action could not have been commenced and tried in a Justice's Court, the plaintiff was entitled to costs. (§ 3228, subd. 8.) *Sherry v. Cary*. 514

3. Where, upon a reference under the statute of a claim against an estate, based on a legal cause of action, the plaintiff recovers nominal damages, even if the plaintiff under the Code of Civil Procedure (§§ 1835, 1836), may not recover his costs (as to which *quære*), the defendant is not legally entitled to costs, nor is the allowance thereof to him discretionary (§ 3240). *Honkins v. Lott*. 577

4. The costs in such case are regulated by the Revised Statutes (2 R. S. 89, § 87) and the section of said Code (§ 3229), giving defendant costs in actions specified in the preceding section "unless the plaintiff is entitled to costs as therein specified," does not give the right, as the preceding section does give plaintiff costs in an action against an executor and administrator (§§ 2863, 3228, subd. 4), and the fact that by other sections the right is made contingent upon a refusal to refer (§§ 1835, 1836), does not authorize the awarding of costs to the executor or administrator on a recovery by the other party al-

though costs may not be awarded to the latter. *Id.*

5. An order awarding costs to an administrator, where he is not entitled to them, is reviewable here. (Code, § 191, subd. 8.) *Id.*

— *When surrogate's decree allowing costs to administrator, not reviewable here.*

See In re Jones. (Mem.) 687

COUNTY COURTS.

1. Under the provision of the state Constitution, as amended in 1873 (art. 6, § 15), and under the provision of the Code of Civil Procedure (§ 340), defining the jurisdiction of County Courts, they are courts of limited and inferior jurisdiction, and so are affected by such presumption. *Gilbert v. York.* 544
2. In an action, therefore, in a County Court to recover a money judgment, an averment in the complaint that the defendant is a resident of the county is necessary. The provision of said Code specifying what must be averred in a complaint (§ 481) is not exclusive. *Id.*
3. The omission of such an averment is, under said Code, a ground for demurrer, as the defect appears upon the face of the complaint. (§ 488.) *Id.*

COURTS.

See APPEAL.

COUNTY COURTS.
GENERAL TERM.
JUSTICES' COURTS.
SURROGATES' COURTS.

COURT OF APPEALS.

See APPEAL.

CREDITOR'S SUIT.

1. In an action by creditors of the vendor to set aside a transfer of

property, where it appears there was a valuable consideration for the transfer, and there is no proof of conspiracy between the vendor and vendee to defraud the creditors of the vendor, proof of acts and declarations of the vendor showing a fraudulent intent on his part are inadmissible against the vendee. *Bush v. Roberts.* 278

2. The action is only maintainable on proof of actual notice on the part of the vendee of the fraudulent intent, or knowledge of circumstances equivalent to such notice. Notice or knowledge may not be made out from declarations of the vendor. *Id.*

CRIMINAL TRIAL.

1. *It seems* the granting or refusal of a motion to postpone the trial of a criminal action is in the discretion of the court, and its decision thereon, where there is no abuse of discretion, is not reviewable upon appeal. *People v. Jackson.* 363
2. Where such an application is based upon the ground of the absence of a witness, it must appear to the court, *first*, that the witness is really material; *second*, that the party applying has been guilty of no neglect; *third*, that the witness can be had at the time to which the trial is deferred. *Id.*
3. The trial of an indictment for murder having been set down for a particular day the court ordered an adjourned term to be held on that day, and directed a specified number of trial jurors to be summoned to attend. These were drawn and summoned in the usual manner, and the court, because of their service during the four weeks session proceeding, discharged the original panel from further attendance. *Held*, that this furnished no ground for a challenge "to the array and the panel of jurors;" that it was within the power of the court to excuse one or all of the jurors originally summoned and to summon any number of others it deemed necessary. (Code of Crim.

Pro. §§ 858, 861; Code of Civil Pro. §§ 84, 1083, 1058.) *Id.*

4. *It seems* that if the dismissal of the regular panel was erroneous, this was not a ground for a challenge to the panel. (Code of Crim. Pro. § 361.) *Id.*
5. A variance between the averment in such an indictment and the proof as to the day on which the crime was committed is immaterial and may be disregarded, or the indictment may be amended. (Code of Crim. Pro. §§ 293, 294, 295.) It is sufficient that the crime was committed at some time prior to the finding of the indictment and that it can be so understood from its allegations. (Code of Crim. Pro. §§ 280, 284.) *Id.*
6. With the consent of defendant, a photograph representing the place where the homicide was committed, was put in evidence. W., a witness for the prosecution, who was present when the photograph was taken and who had seen part of the affair from a window near by, placed three persons in the highway to represent the positions, which, according to his recollection the deceased, the defendant and another person present at the homicide occupied. W.'s testimony as to that fact was received under objection and exception. *Held*, no error. *Id.*
7. Defendant's counsel, under an offer to show that he carried the revolver with which the crime was committed to protect himself from a threatened assault by one W., offered proof of threats made by W. against defendant; there was no suggestion that these threats had come to defendant's knowledge. *Held*, that the offer was properly rejected. *Id.*
8. Upon a criminal trial S., a witness for the prosecution, testified to a conversation with one of defendant's witnesses who had been previously examined and had testified that he had no conversation with S. on the subject. This was objected to on the ground that defendant's witness had not been

previously particularly interrogated as to the time, place, etc., and it was received under objection. Defendant thereafter recalled his witness and interrogated him particularly as to the alleged conversation, and he contradicted the version of it testified to by S. *Held*, that while the objection was well taken and would have been fatal to the conviction if defendant had rested upon his exception, he waived the objection by recalling and examining his witness. *People v. Weldon.* 569

DAMAGES.

1. While the innocent purchaser of a usurious security, when the purchase was induced by fraud, may enforce the security against the maker if he is privy to the fraud, to the extent of the money paid by such purchaser, or may rescind and recover back that sum, with interest, the policy of the usury laws requires a limitation to that amount, and he cannot in any form of action recover more. *Miller v. Zeimer.* 441
 2. Where, therefore, a bond and mortgage was executed without consideration, and M., plaintiffs' testator, purchased the same for less than its face, but in good faith and in reliance upon representations on the part of the mortgagor and mortgagee that the securities were valid, given upon a full consideration and free from usury, and where, in an action to foreclose the mortgage the judgment decreed a sale but only to satisfy the sum actually advanced, *held*, that an action was not maintainable against the mortgagor and mortgagee to recover, because of the fraud, the difference between the value of the mortgage as represented, and its actual value to the assignee. *Id.*
- *In action of ejectment.*
See Gilman v. Gilman. 265
- ### DEBTOR AND CREDITOR.
1. The right of a creditor of a firm

to share in the estate of a deceased member of the firm in the hands of his administrator, where there is no joint estate and the surviving partner is insolvent, is governed by the rules by which courts of equity are guided in distributing the separate estate of an insolvent as between his separate creditors and those of a copartnership of which he was a member. *In re Gray*. 404

2. While, as a general rule in such cases, the separate creditors are entitled to be first paid, where a creditor at the time a debt is contracted for the benefit of the firm, requires therefor and receives the joint and several obligation of the copartners individually, it thereby becomes the several debt of each of them; the holder is entitled to the benefit of the security according to its terms, and has the right to prove it against the separate estate of the decedent, and to share equally with the other separate creditors in the distribution. *Id.*

3. In an action to recover possession of property alleged to have been wrongfully detained, plaintiff claimed under bill of sale which the evidence showed was intended as a mortgage. The instrument was not filed as a chattel mortgage. The property was at the time in store, and was subsequently levied on by defendant's intestate by virtue of an attachment. There was sufficient evidence to justify a finding that it never went into plaintiff's possession prior to the levy under the attachment. *Held*, that as against the attaching creditor the mortgage was void under the statute (Chap. 279, Laws of 1833); that a mere constructive possession would not answer the requirements of the statute. *Siedenbach v. Riley*. 560

4. Also, *held*, that if the instrument was intended as a pledge, there was a similar infirmity in plaintiff's position, as a pledge could not become operative without delivery to the pledgee. *Id.*

5. Also, *held*, that a similar infirmity attaches if the instrument was to be considered as a bill of sale, in

the absence of proof that it was made in good faith and without intent to defraud, as the sale not having been accompanied by immediate delivery and followed by a continued change of possession was presumptively fraudulent as against creditors of the vendor. (2 R. S. 136, § 5.) *Id.*

See CREDITOR'S SUIT.

DEEDS.

In the absence of a covenant or agreement to that effect, contained in the instrument of conveyance, the grantee of lands does not assume a personal obligation to pay existing incumbrances. *Smith v. Cornell*. 554

See GRANT.

DEFENSES.

1. In an action to recover back a proportionate part of moneys paid upon an assessment for a local improvement in the city of New York, *prima facie* valid, and which created an apparent lien upon the lands assessed, where the facts rendering a portion of the assessment invalid were all *de hors* the record, it is no defense that the assessment has not been vacated or reduced under and in pursuance of said act. *Diefenthaler v. Mayor*, etc. 331

2. A decree of a surrogate setting aside, on the ground of fraud, a decree rendered on the final accounting of an administrator, which by its terms discharged the sureties, and ordering a further accounting, is binding on the sureties, although they were not served with notice of the application; and the omission to give notice is no defense to an action brought pursuant to an order of the surrogate directing the prosecution of the bond because of the failure of the administrator to pay over a sum directed, on a further accounting, to be paid by him to one of the next of kin. *Deobold v. Oppermann*. 531

3. Nor is it any defense that, pursuant to an agreement made with them at the time the sureties executed the bond, the administrator deposited with them the proceeds of the estate, to be retained until they were discharged from liability on the bond, and with the authority to use the proceeds in their business, they paying interest, and that upon the rendition of the decree discharging them they paid over the amount so deposited. *Id.*

4. A transferee from an executor or administrator cannot protect himself from an action brought by the trustee to reclaim the trust fund by showing that such trustee is a legatee under the will or next of kin to the intestate, and thus entitled to an interest in the fund. *Id.*

5. The defense of a former suit pending, to be available, must be pleaded. *Hollister v. Stewart.* 644

DEFINITIONS.

The word "children" is a flexible one, and in determining as to whether when used in a will, it was intended to be limited strictly to its primary meaning, or was intended to be used in its broader sense as issue, the context may be resorted to, and that meaning should be preferred, when the reason of the thing sustains it, which permits the children of a deceased child to inherit. *In re Paton.* 480

—When the term "legal representatives" means children or their lineal descendants, not executors or administrators.

See Greenwood v. Holbrook. 485

DEVISE.

The will of M. gave to his wife certain premises, together with certain personal property, to be received by her in lieu of dower. At the time of the testator's death there was a mortgage upon the premises, the amount of which was about the value of the premises. The

widow accepted the provisions. Subsequently the mortgage was foreclosed, resulting in a deficiency. In an action for a construction of the will, *held*, that the widow was not entitled to be allowed the value of the real estate; that under the statute (1 R. S. 749, § 4), she simply took the equity of redemption and was required as devisee, to pay and satisfy the mortgage. *Meyer v. Cahen.* 270

See WILLS.

EJECTMENT.

1. The will of G. gave to his wife, so long as she remained his widow, "for her own use and occupation, and none other," one-third of his "mansion house." The other two-thirds the will declared were to be for the use of such of the testator's children by his said wife as might choose to occupy the same. In case none of them so chose, the wife was to have the use of the whole. The provisions made in the will for the wife were declared to be in lieu of dower. His residuary estate the testator gave to his children. Upon the death of the testator the widow waived the provisions for her in the will and claimed dower, and provision was made for her by a court of competent jurisdiction. Defendant, a son of G. by a former wife, took possession of three rooms in the mansion; another heir occupied a fourth and the remainder was unoccupied. In an action of ejectment, brought by the children of the testator by his second wife, it appeared that they made a formal demand of defendant for possession of the whole house, and required him to move out at once. He offered to leave as soon as he could find another place, and expressed a willingness for them to move in without delay, and it did not appear that at any time he denied plaintiffs' right to any part of the premises; about two months after the demand he did move out. The court charged the jury that the plaintiffs were entitled to recover possession of two-thirds of

the premises, with damages. *Held*, error; that the portion the widow refused became part of the residue and vested under the will in his heirs, and, among them, the defendant, and so the parties were tenants in common; that plaintiffs failed to prove that they had been actually ousted, or that there had been any denial of their rights as co-tenants, in the absence of which proof they were not entitled to recover. (Code of Civ. Pro. § 1515.) *Gilman v. Gilman.* 265

2. Defendant's answer was a general denial. *Held*, that this was substantially a denial that defendant was guilty of unlawfully withholding the premises as alleged in the complaint, and under it defendant was entitled to prove any matter which would defeat the action, and the burden was upon plaintiffs of showing a right to the possession of the premises as against defendant at the time of the commencement of the action. *Id.*

8. The court charged that plaintiffs were entitled to recover, as damages, the value of the use of two thirds of the premises from the time of demand up to the trial. *Held*, error; that they were only entitled to recover, if at all, damages up to the time of the surrender of the premises. *Id.*

EMINENT DOMAIN.

1. An order of the General Term of the Supreme Court affirming an order of Special Term confirming the report of the commissioners of estimate and assessment in proceedings to acquire title to lands for the purpose of establishing a public place in the city of New York under the act of 1884 (Chap. 451, Laws of 1884), is not reviewable here. *In re Board of Street Opening, etc.* 581
2. The privilege given to the M. T. Co. under the act creating it (Chap. 833, Laws of 1872), "to construct and operate certain railroads in the city of New York," having been

defined and limited by the act, it was bound to exercise that privilege, if at all, according to the terms in which it was conferred; it could not take part and reject the rest. *In re Met. Transit Co.* 588

3. As a condition upon which the court could be asked to intervene in its favor to enable it to acquire lands and street rights, the company was obliged to show, under oath, that it is its "intention, * * * in good faith, to construct and finish a railroad from and to the places named * * * in its articles of association." (Laws of 1850, chap. 140, § 14.) *Id.*

ESTOPPEL.

1. Where, in a foreclosure suit, such facts are stated as will, if admitted, subject the title of a defendant to the plaintiff's mortgage and to the relief sought, and such defendant makes default or answers, and judgment goes against him, he will be estopped from afterwards setting up his interest as against the judgment, and what binds him in this respect cannot be questioned by any other person. *Goebel v. Iffla.* 170
2. In an action for the wrongful detention and conversion of personal property, defendant's answer denied the conversion and alleged that plaintiff placed the property with him under an arrangement and with power to use and invest it in transactions on joint account, and that heavy losses were incurred in the course of defendants management of the estate, of all of which plaintiff had knowledge and was furnished with statements. No affirmative relief was asked by defendant. An application for a bill of particulars of the losses, referred to in defendant's answer, was granted. *Held*, no error; that defendant by setting up the losses in his answer was estopped from denying their materiality on the motion. *Onard v. Francklyn.* 511

EVIDENCE.

1. Where the probate of a will is contested on the ground of the unsoundness of mind of the testator, a physician who has attended upon the deceased in a professional capacity, is not a competent witness for the contestants to testify from knowledge acquired while so attending him as to his mental incapacity. (Code of Civil Pro. § 834.) *In re Coleman.* 220
2. The prohibition of the Code of Civil Procedure (§ 835), against the disclosure by an attorney of a communication by his client to him or his advice thereon, in the course of his professional employment, applies to instructions given, by one proposing to execute a will, to an attorney employed to draw it, and to conversations had with the attorney for the purpose of enabling him to carry out the instructions. *Id.*
3. Where, however, the attorney is requested by the testator to sign the attestation clause of the will as witness thereto, this is an express waiver within the meaning of said Code (§ 836) of the pledge of secrecy so imposed and authorizes the disclosure. *Id.*
4. The provision of the Code authorizing such a waiver by the client does not require it to be in writing or in any particular form or manner or at any particular time or place; it must be an express waiver made in such a manner as to show the testator intended to exempt his attorney, in the particular case, from the prohibition. *Id.*
5. A testator, in requesting a person to sign, as a subscribing witness to his will, is presumed to know the obligations assumed by the witness in respect to the proof of the will; among other things, the duty to testify as to the circumstances attending its execution, including the mental condition of the testator at that time, as evidenced by his action, conduct and conversation. *Id.*
6. The act of a testator, therefore, in requesting his attorney, who drew his will, to become a witness to it, is clearly indicative of an intention to waive the statutory prohibition, and so leave the witness free to perform the duties of the office assigned him. *Id.*
7. Where the probate of a will is contested, legatees under it are not competent witnesses for the proponent as to personal transactions or communications between them and the testator. (Code of Civil Pro. § 829.) *Loder v. Whelpley.* 239
8. Where a legatee, however, has executed a valid release of all his interest the disability is removed, and he may properly be examined as a witness. *Id.*
9. An executor and proponent of a will is not disqualified from testifying to such transactions or communications. *Id.*
10. The provision of the Code of Civil Procedure (§ 834), prohibiting a physician or surgeon from disclosing "any information which he acquired in attending a patient in a professional capacity," etc., applies to proceedings for the probate of a will, and after the death of the patient the prohibition cannot be waived by anyone. *Id.*
11. The fact, therefore, that a physician is called as a witness by an executor and proponent of a will, does not render him competent to disclose any information acquired while attending upon the testator. *Id.*
12. An attorney, in receiving the directions or instructions of one intending to make a will, although he asks no questions and gives no advice, but simply reduces to writing the directions given to him, still acts in a professional capacity and is prohibited from disclosing any communication so made to him by his client. (Code of Civil Pro. § 835.) *Id.*
13. Where, in an action upon a guaranty of collection of a debt, the

defense is, that the debtor was not prosecuted with due diligence, evidence that a delay in prosecution was with the acquiescence of the guarantor, is competent, on the part of the plaintiff, as bearing upon this issue. *Mead v. Parker*. 259

14. Proof of such acquiescence is also competent, as showing a waiver by the guarantor of his strict right to take advantage of the creditor's indulgence, to avoid the guaranty. *Id.*

15. In an action by creditors of the vendor to set aside a transfer of property, where it appears there was a valuable consideration for the transfer, and there is no proof of conspiracy between the vendor and vendee to defraud the creditors of the vendor, proof of acts and declarations of the vendor showing a fraudulent intent on his part are inadmissible against the vendee *Bush v. Roberts*. 278

16. With the consent of defendant, upon the trial of an indictment for murder, a photograph representing the place where the homicide was committed, was put in evidence. W., a witness for the prosecution, who was present when the photograph was taken and who had seen part of the affair from a window near by, placed three persons in the highway to represent the positions, which, according to his recollection the deceased, the defendant and another person present at the homicide occupied. W.'s testimony as to that fact was received under objection and exception. *Held*, no error. *People v. Jackson*, 362

17. Defendant's counsel, under an offer to show that he carried the revolver with which the crime was committed to protect himself from a threatened assault by one W., offered proof of threats made by W. against defendant; there was no suggestion that these threats had come to defendant's knowledge. *Held*, that the offer was properly rejected. *Id.*

18. The question as to whether real

estate is partnership property may be determined on parol evidence, independent of the particular form which the transaction took or the name in which the title was taken. *Greenwood v. Marvin*. 423

EXCEPTIONS.

1. To authorize the General Term to review the facts on an appeal from a surrogate's decree admitting a will to probate, it is not essential that the surrogate's finding of fact should be challenged by an exception, nor is any request to find further facts necessary. An appeal on the facts, as well as on the law, is sufficient to give the appellate court jurisdiction, and an exception to a finding of fact is neither necessary or proper. *Burger v. Burger*. 523

2. The questions which may be raised by exception under the Code of Civil Procedure (§ 2545), permitting an exception to be taken to the ruling of a surrogate upon an issue of fact, are questions of law. The findings of a material fact without evidence, a refusal to pass upon a question of fact, or to find a fact which the evidence conclusively establishes, if properly excepted to, raises a question of law, and to such a ruling an exception is permitted under said section; but it has no relation to findings on controverted facts or to refusals to find facts not conclusively established. *Id.*

EXECUTORS AND ADMINISTRATORS.

1. Although a creditor of an estate was not bound, as the law stood in 1872, to institute proceedings to compel the sale of real estate to pay debts until after an executor or administrator had rendered an account, such omission did not stop the running of the statute of limitations as against the debt. *Butler v. Johnson*. 204

2. An executor or administrator is bound to set up the bar of the

statute of limitations, and has no authority to allow a claim so barred. *Id.*

3. As against an estate, therefore, a debt barred by the statute is to be regarded as no debt. *Id.*

4. Where an executor, having a power of sale of the testator's real estate, to pay debts, is taking steps to execute the power for the purpose of paying debts which are outlawed, those who have succeeded to the testator's title may maintain an action to restrain such sale, as it would place a cloud upon their title. *Id.*

5. J. died June 14, 1871, leaving a will which was admitted to probate June 28, 1871. By the will the executrix was authorized to sell the real estate to pay debts. In 1883 defendant, as executrix of J., upon application of a legatee and certain simple contract creditors, published a notice of sale of said real estate to pay said legatee and creditors. The accounts of said executrix had never been judicially settled. In an action brought by grantees of the heirs-at-law to restrain such sale, *held*, that both the legacy and debts were barred by the statute of limitations prior to the time the Code of Civil Procedure went into effect, and so were not revived by the provision of that Code (§ 1819), declaring that, for the purpose of computing the time within which a cause of action may be commenced by a legatee against an executor to recover a legacy, the cause of action is deemed to accrue when the executor's account is judicially settled; and that the action was maintainable by plaintiffs. *Id.*

6. *It seems* the legatee could have asked the surrogate to decree payment of the legacy by the executrix, which decree could have been enforced if there were assets. (2 R. S. 90; § 45; *id.* 116, § 18.) After the expiration of eighteen months she could have cited the executrix to account before the surrogate and the accounting could have been enforced. (2 R. S. 92, § 52 *et seq.*) She could have pro-

ceeded by action for a simple accounting or for payment of the legacies, and could have included therein a prayer that if the personal property was insufficient the executrix should be compelled to exercise the power of sale of the real estate given her by the will, and with the proceeds pay such legacies. The six-years limitation, however, applied to all these remedies, as equity follows the law in cases of concurrent jurisdiction of the two courts, and when the remedy at law is as effectual as the equitable one the legal statute of limitation applies to the remedy in equity. *Id.*

7. An executor and proponent of a will is not disqualified under the Code of Civil Procedure (§ 829) from testifying to transactions or communications between him and the testator. *Loder v. Whelpley.* 239

8. An executor has no authority to credit in his accounts items not constituting a legal charge against the fund in his hands. *In re Selleck.* 284

9. Credits, therefore, for payment of taxes not a lien on property of the testator at the time of his death, or on property not owned by the testator, and credits for payments made by the executor, by request of heirs, and for which the estate was not liable, are improper and may not be allowed upon settlement of the executor's accounts. *Id.*

10. Upon settlement of the accounts of an executor, the surrogate disallowed a credit of \$82.50, claimed to have been paid to a surrogate many years previously. The surrogate disallowed it because there was neither a voucher nor a sufficient explanation for the payment. The General Term of the Supreme Court allowed the credit. *Held* error. *Id.*

11. The executor, under a power of sale contained in the will, sold a lot to D. No debit for the purchase-money was made in his account. The executor explained that the payment was made by

withholding from D. moneys coming to him from the trust estate. *Held*, that it should have been entered in the accounts; and that he was properly charged therewith by the surrogate. *Id.*

12. Under the Code of Civil Procedure (§§ 2557-2559, 2570), it is within the discretion of a surrogate, upon the settlement of the accounts of an executor or testamentary trustee to award costs "payable by the party personally or out of the estate or fund as justice requires;" and, while the exercise of this discretion is so qualified by the words "as justice requires" as to authorize the interposition of the General Term, where there has been an abuse of discretion and a violation of justice, it has no other power of review. *Id.*
13. When the General Term reverses a surrogate's decree, imposing costs upon an executor or trustee personally, it must appear in the order of reversal that the ground therefor was the abuse of discretion by the surrogate; in the absence of this statement, the order is not sustainable. *Id.*
14. While, when upon a final accounting of a testamentary trustee, it appears that the annual income of the trust estate was distributed to the beneficiaries, the trustee may be allowed full commissions annually, although he did not account annually, the fact that the income was received and distributed monthly, does not authorize the trustee to charge full commissions monthly. *Id.*
15. An executor was charged with moneys received from heirs to pay a mortgage upon the testator's real estate. *Held*, in the absence of evidence, that the executor withheld or appropriated the money, he was not properly charged with interest thereon. *Id.*
16. The remedy against a foreign administrator, in his representative character, to charge the assets of his intestate for a debt or liability of the decedent, is governed by the law of the jurisdiction, and must be pursued in the legal tribunals of the state or country where the decedent resided at the time of his death and where administration was granted. *Lyon v. Park.* 350
17. The right of a creditor of a firm to share in the estate of a deceased member of the firm in the hands of his administrator, where there is no joint estate and the surviving partner is insolvent, is governed by the rules by which courts of equity are guided in distributing the separate estate of an insolvent as between his separate creditors and those of a copartnership of which he was a member. *In re Gray.* 404
18. While, as a general rule in such cases, the separate creditors are entitled to be first paid, where a creditor at the time a debt is contracted for the benefit of the firm, requires therefor and receives the joint and several obligation of the copartners individually, it thereby becomes the several debt of each of them, the holder is entitled to the benefit of the security according to its terms, and has the right to prove it against the separate estate of the decedent, and to share equally with the other separate creditors in the distribution. *Id.*
19. On settlement of the accounts of a testamentary trustee the claim of an administrator, with the will annexed, to commissions was rejected, and the question as to his right to commissions reserved until his accounting as administrator. *Held*, no error. *In re Paton.* 490
20. The sureties upon an administrator's bond are his privies, and so are precluded from questioning any lawful order made by the surrogate in proceedings wherein the administrator is a party, if obtained without collusion between him and the next of kin or creditors of the estate. *Deobold v. Oppermann.* 531
21. A decree, therefore, of a surrogate setting aside, on the ground of fraud, a decree rendered on the final accounting of an administrator, which by its terms discharged the sureties, and ordering a further

- accounting, is binding on the sureties, although they were not served with notice of the application; and the omission to give notice is no defense to an action brought pursuant to an order of the surrogate directing the prosecution of the bond because of the failure of the administrator to pay over a sum directed, on a further accounting, to be paid by him to one of the next of kin. *Id.*
22. Nor is it any defense that, pursuant to an agreement made with them at the time the sureties executed the bond, the administrator deposited with them the proceeds of the estate, to be retained until they were discharged from liability on the bond, and with the authority to use the proceeds in their business, they paying interest, and that upon the rendition of the decree discharging them they paid over the amount so deposited. *Id.*
23. Such a contract is invalid and gives the sureties no right to retain funds received by virtue of it, and *it seems* an action could be maintained against them by the administrator to reclaim the funds in case of refusal to pay them over. *Id.*
24. A party cannot claim to have been defrauded who has been induced by artifice to do that which the law would have compelled. *Id.*
25. The object of an administrator's bond is to relieve the next of kin from the necessity of resorting to the personal liability of a dishonest, negligent or absconding administrator, and so it is the duty of the sureties, not that of the next of kin, to pursue the administrator for money of the estate improperly retained by him. *Id.*
26. When an administrator obtains by fraud a decree awarding the funds of the estate to him and canceling his bond, this, in itself, is a breach of the covenant of the bond that he will faithfully execute his trust, and renders the sureties liable; they cannot stand as innocent parties in relation to an act which they have covenanted shall never be performed. *Id.*
27. The employment of the trust fund by an administrator or other trustee for his individual benefit, or as loans to persons engaged in and to be used in business, is illegal and constitutes a *devastavit*, and the funds may be reclaimed by the trustee or the beneficiaries of the trust from anyone receiving them with knowledge of their character. *Id.*
28. A transferee from an executor or administrator cannot protect himself from an action brought by the trustee to reclaim the trust fund by showing that such trustee is a legatee under the will or next of kin to the intestate, and thus entitled to an interest in the fund. *Id.*
29. An executor or administrator cannot bind the estate to any use of its funds by contract with third persons having knowledge of their character except in the ordinary and usual course of administration. *Id.*
30. The next of kin of an intestate are entitled not only to the security afforded by the bond of the administrator, but also to that of the funds of the estate remaining in his hands, and it is unlawful for him to place those funds beyond the reach of the Surrogate's Court, and irreclaimable until after the duties of administration have been performed. *Id.*
31. It is no defense, therefore, in an action against a third person to recover possession of such funds, that he holds them by virtue of a contract with the executor or administrator. *Id.*
32. In January, 1883, one S. died, seized of certain real estate which, by his will, he devised to his executor in trust for certain uses and purposes. This trust was, in an action brought by plaintiff, his only child, in November, 1883, adjudged invalid and the lands were held to descend to plaintiff as the testator's sole heir-at-law. At the time of the testator's death the taxes on these lands for several years were unpaid, and in May,

1888, a sale was had for the unpaid taxes of 1879. Immediately after obtaining the decree setting aside the trust, plaintiff brought an action, to compel defendant, as executor, to pay from the personal property in his hands the taxes remaining unpaid and to redeem the lands from the tax-sale. The executor set up as a defense that plaintiff had purchased the lands at a sale in October, 1888, under a decree in an action brought by the widow against the executor, in his capacity as trustee, for the recovery of her dower, to which plaintiff was not a party, which sale and the conveyance thereunder were made subject to the unpaid taxes and the sale for taxes. It appeared that the testator's personal estate was sufficient to discharge the tax liens, and no claims had been presented to the executor pursuant to his notice of a character entitled to a preference over the taxes imposed and unpaid prior to the testator's death. *Held*, that the taxes were the personal debts of the testator and the executor was not released, by the plaintiff's purchase in the dower action and acceptance of the deed, from the obligation imposed upon him by the statute (2 R. S. 87, § 27), to pay the same. *Smith v. Cornell*. 554

83. Where, upon a reference under the statute of a claim against an estate, based on a legal cause of action, the plaintiff recovers nominal damages, even if the plaintiff under the Code of Civil Procedure (§§ 1835, 1836), may not recover his costs (as to which *quære*), the defendant is not legally entitled to costs, nor is the allowance thereof to him discretionary (§ 3240). *Hopkins v. Lott*. 577

84. The costs in such case are regulated by the Revised Statutes (2 R. S. 89, § 37), and the section of said Code (§ 3229), giving defendant costs in actions specified in the preceding section "unless the plaintiff is entitled to costs as therein specified," does not give the right, as the preceding section does give plaintiff costs in an action against an executor and administrator (§§ 2868, 3228, subd. 4), and the

fact that by other sections the right is made contingent upon a refusal to refer (§§ 1835, 1836), does not authorize the awarding of costs to the executor or administrator on a recovery by the other party although costs may not be awarded to the latter. *Id.*

35. An order awarding costs to an administrator, where he is not entitled to them, is reviewable here. (Code, § 191, subd. 3.) *Id.*

— *When surrogate's decree allowing costs to administrator, not reviewable here.*

See In re Jones (Mem).

687

FERRIES.

1. In proceedings to review by *certiorari* the determination of the Board of Assessors of the city of Brooklyn in assessing for taxation certain premises used as a ferry landing place, it appeared that the city of New York has occupied by its agents and trustees for two hundred and fifty years, under a conceded title, the said landing-place, and used it for the convenience of the public as an incident to a ferry franchise granted to it. *Held*, that the authority conferred and the duty imposed by the grant of the ferry franchise presupposes the right to acquire what was essential to its operation and to maintain the ferry, and as it could not be operated without a landing on the Brooklyn side, the franchise conjoined with the ownership of the landing, constituted a ferry property belonging to New York, devoted to public use, and so that it was not taxable. *People ex rel. v. Board of Assessors*. 505

2. Also, *held*, the fact that the city of New York operates the ferry through lessees and derives revenue from the rental, and not by its own operation of the ferry, did not make the franchise or the landing taxable. *Id.*

FORECLOSURE.

1. F. died in 1853, leaving a widow

and one son, who afterwards married and had one child. By his will F. devised his real estate to his wife, in trust, for the enjoyment of herself and his children during her life, remainder to his children, and in case they died without issue before his wife, then to the testator's brothers and sisters. The widow accepted the trust and, on notice to the testator's son, applied to the Supreme Court for authority to mortgage the real estate for the purpose of preserving and improving it. An order was made permitting the widow, as trustee, to borrow \$900, and in that character to execute a bond and mortgage to secure its payment. The order declared that upon the execution and delivery of the mortgage it should be a first lien on the land, the same as if executed by F. in his lifetime, and "without regard to the persons who may or shall eventually become seized or possessed of any estate or interest in said land under said will." A mortgage was executed in conformance with the order, which purported to convey all the estate F. had in the land during his lifetime and all the estate of the widow, individually, and as trustee and beneficiary, and also of the devisees in and under the will. In an action to foreclose the mortgage, the trustee, the son, such of the brothers and sisters of the testator as were living, and the children of those who had died, were made defendants, and were alleged to "have or claim to have some interest in or lien upon the said mortgaged premises or some part thereof, because or by reason of the provisions of said will in the event of the death of the son of the testator," and his child and any other children born to him dying prior to the testator's widow. It was also alleged that such interest or lien was subsequent and subordinate to the lien of plaintiff's mortgage, as would also be the rights and interests of said defendants if they accrued. The defendants were all duly served and judgment by default was entered, which directed a sale and that the surplus should be invested

by the trustee, and upon the happening of the contingency mentioned in the will should pass to the devisee or persons entitled thereto pursuant to the provisions of the will. The purchaser at the foreclosure sale refused to complete his purchase on the ground that the expectant estate of the testator's brothers and sisters has not been divested, and in case of the death of his son without issue during his mother's life, the gift to them would take effect. In proceedings to compel said purchaser to complete his purchase, *held*, that all the parties in interest having been made parties to the foreclosure suit and thus given an opportunity to pay off the mortgage or defend against it, the judgment was final; that the purchaser would acquire a good title and should be compelled to complete his purchase. *Goebel v. Iffa*. 170

2. While prior incumbrancers are neither necessary nor proper parties to an ordinary action of foreclosure, when made parties under the general allegation that they claim an interest "as subsequent purchaser, incumbrancer or otherwise," a decree will not affect them. *Id.*
3. If facts upon which the plaintiff in a foreclosure suit relies to defeat a prior title are stated, the defendant whose title is thus assailed may demur to the complaint upon the ground that the plaintiff has no right to bring him into court to try his title in such an action. *Id.*
4. Where, however, such facts are stated as will, if admitted, subject the title of a defendant to the plaintiff's mortgage and to the relief sought, and such defendant makes default or answers, and judgment goes against him, he will be estopped from afterwards setting up his interest as against the judgment, and what binds him in this respect cannot be questioned by any other person. *Id.*
5. It is only where a bond is shown to have accompanied a mortgage, and it contains the only apparent

evidence of the debt to which the mortgage is collateral, that it must be produced, or its non-production accounted for on trial of an action to foreclose the mortgage. *Munoz v. Wilson.* 295

6. Where, therefore, it appears on the trial of such an action that, although the mortgage recited the giving of a bond, no bond was, in fact, executed, and the existence of and liability for the debt secured is shown by the statements and covenants contained in the mortgage, the non-production of a bond is not fatal to a judgment of foreclosure. *Id.*

7. Where there has been an unqualified delivery of a mortgage to a third person for the use of the mortgagee, with intent to make it an operative obligation, and the mortgage is recorded by such third person, although such delivery and record was without the knowledge of the mortgagee; if the rights of creditors, purchasers or incumbrancers have not intervened, it is competent for the mortgagee or his representatives to assent to and ratify the arrangement and to enforce the mortgage. *Id.*

8. M., for the purpose of defrauding his creditors, deeded certain real estate to G. without consideration, upon a verbal agreement that the latter should hold the same for the benefit of M., and dispose of the same as he might direct. Subsequently M. procured G. to execute a mortgage on the premises to C., plaintiff's intestate, for the amount of a debt due by M. to her. The mortgage was delivered by G. to M. with authority to deliver it to C., and M. caused it to be recorded. He did not himself deliver it to C., and the latter died a few weeks after the mortgage was so delivered to M. About the time of receiving the deed, G., without consideration, executed and delivered to M. a deed conveying the premises to his wife M. retained it for about two years after the recording of the mortgage, and then caused it to be recorded. In an action to foreclose the mortgage, *held*, the facts justified a finding of delivery and ac-

ceptance of the mortgage; and that the mortgage had a preference over the deed. *Id.*

9. M., as a witness for defendants, testified to certain facts, as to which there was no direct contradictory testimony. This testimony was, however, in conflict with legal presumptions arising from acts and admissions of M. and G., which were in evidence, and, in several material respects, other testimony of M. was contradicted by that of disinterested witnesses. *Held*, that the trial court was not bound by the testimony of M., even when uncontradicted, but was justified in giving credit thereto only so far as it deemed it in harmony with the other facts and circumstances of the case. *Id.*

FORMER ADJUDICATION.

1. F. died in 1858, leaving a widow and one son, who afterwards married and had one child. By his will F. devised his real estate to his wife, in trust, for the enjoyment of herself and his children during her life, remainder to his children, and in case they died without issue before his wife, then to the testator's brothers and sisters. The widow accepted the trust, and, on notice to the testator's son, applied to the Supreme Court for authority to mortgage the real estate for the purpose of preserving and improving it. An order was made permitting the widow, as trustee, to borrow \$900, and in that character to execute a bond and mortgage to secure its payment. The order declared that upon the execution and delivery of the mortgage it should be a first lien on the land, the same as if executed by F. in his lifetime, and "without regard to the persons who may or shall eventually become seized or possessed of any estate or interest in said land under said will." A mortgage was executed in conformance with the order, which purported to convey all the estate F. had in the land during his lifetime and all the estate of the widow, individually, and as trustee and

beneficiary, and also of the devisees in and under the will. In an action to foreclose the mortgage, the trustee, the son, such of the brothers and sisters of the testator as were living, and the children of those who had died, were made defendants, and were alleged to "have or claim to have some interest in or lien upon the said mortgaged premises or some part thereof, because or by reason of the provisions of said will in the event of the death of the son of the testator," and his child and any other children born to him dying prior to the testator's widow. It was also alleged that such interest or lien was subsequent and subordinate to the lien of plaintiff's mortgage as would also be the rights and interests of said defendants if they accrued. The defendants were all duly served and judgment by default was entered, which directed a sale and that the surplus should be invested by the trustee, and upon the happening of the contingency mentioned in the will should pass to the devisee or persons entitled thereto pursuant to the provisions of the will. The purchaser at the foreclosure sale refused to complete his purchase on the ground that the expectant estate of the testator's brothers and sisters has not been divested, and in case of the death of his son without issue during his mother's life, the gift to them would take effect. In proceedings to compel said purchaser to complete his purchase, *held*, that all the parties in interest having been made parties to the foreclosure suit and thus given an opportunity to pay off the mortgage or defend against it, the judgment was final; that the purchaser would acquire a good title and should be compelled to complete his purchase. *Goebel v. Iffa*. 170

2. Where, in a foreclosure suit, such facts are stated as will, if admitted, subject the title of a defendant to the plaintiff's mortgage and to the relief sought, and such defendant makes default or answers, and judgment goes against him, he will be estopped from afterwards

setting up his interest as against the judgment, and what binds him in this respect cannot be questioned by any other person. *Id*.

3. An order of General Term reversing a judgment entered upon a verdict directed by the trial court and ordering a new trial, is not *res adjudicata* between the parties, and upon an appeal to this court from a General Term judgment, affirming a judgment rendered on second trial, every question of law appearing in the record can be considered as if the General Term decision was rendered upon a first appeal. *Siedenbach v. Riley*. 560

— *When the executor of a deceased plaintiff has been substituted in his stead, the right of the executor to continue the action is adjudicated by the order of substitution and cannot be questioned on appeal from judgment in the action.*

See Greenwood v. Marvin. 423

FORMER SUIT PENDING.

The defense of a former suit pending, to be available, must be pleaded. *Hollister v. Stewart*. 644

FRANCHISE.

1. *It seems* that, while, by the incorporation of a company under the act of 1884 (Chap. 252, Laws of 1884), providing for the organization of street railroad companies, it is endowed with capacity to acquire and hold such rights and property, real and personal, as are necessary to enable it to transact the business for which it was created, and is allowed to mortgage its franchise as security for loans made to it, it has no present right or authority to construct or operate a railroad upon the streets of any municipality. *People v. O'Brien*. 1
2. This right it may acquire by purchase, but it can only be acquired from the city authorities, who can

grant or refuse it at their pleasure, and may grant their consent upon such terms and conditions as they choose to impose. *Id.*

8. Although such a corporation be created for a limited period, it may acquire title in fee to property necessary for its use; and where the grant to it of the franchise to construct and operate its road in a city street is not, by its terms, limited and revocable, the grant is in fee, vesting the grantee with an interest in the street in perpetuity to the extent necessary for a street railroad; the rights granted to be exercised by the corporation or whomsoever may lawfully succeed to them. *Id.*

4. The statutes and authorities showing that such franchises are invested with the character of property, and are transferable as such, independent of the life of the original corporation, collated. *Id.*

5. The tracks of a railroad company and the franchise of maintaining and operating its road in a public street are inseparable. *Id.*

— When ferry franchises not taxable.

See *People ex rel. v. Bd. Assessors.*

506

FRAUD.

1. The rule of the common law making a husband liable for the tortious acts of his wife, was not abrogated by the Code of Civil Procedure and is still in force. A husband is, therefore, properly joined with his wife, as defendant, in an action to recover damages for a fraud perpetrated by the wife. *Mangam v. Peck.* 401

2. In an action brought to recover an amount claimed by plaintiff to be due him for work done and materials furnished under a contract to regulate and grade a street in the city of New York, the defendant averred in its answer that, upon the estimated quantities of the work to be done, plaintiff was the lowest bidder, but that by reason

of "the inadvertence, ignorance, carelessness or error of the surveyor," an error arose whereby the contract as awarded to plaintiff, required a payment of nearly twice the actual value of the work; that plaintiff, prior to making his bid, knew that the estimate misstated certain items and in bad faith, and with intent to profit by the ignorance of the surveyor, made an unbalanced bid. There was no allegation or proof of a fraudulent collusion between plaintiff and the officers of the corporation. The city surveyor testified on the trial that he made his estimates from surface indications, and as correctly as he could; but that the nature of the locality was such that any estimate in advance was unreliable. *Held*, that no fraud was established on the part of the plaintiff, and he was entitled to recover; that he had a right to the benefit of his own knowledge honestly acquired, so long as he did nothing to mislead or deceive the city; that it having invited bids upon the basis of the estimates made, and awarded the contract to one who was the lowest bidder, tested by the proposals, it could not hold the contractor to a performance and then annul the contract because the actual result so varies from the estimates as to make the accepted bid higher than the others; that the lowest bidder under the estimates is the lowest bidder under the law, and he does not lose his right because the estimates are erroneous; that having complied with the law and entered into the contract, the city could not urge against him its own ignorance or error. *Reilly v. Mayor, etc.* 478

3. A decree of a surrogate setting aside, on the ground of fraud, a decree rendered on the final accounting of an administrator, which by its terms discharged the sureties, and ordering a further accounting, is binding on the sureties, although they were not served with notice of the application; and the omission to give notice is no defense to an action brought pursuant to an order of the surrogate directing the prosecution of

the bond because of the failure of the administrator to pay over a sum directed, on a further accounting, to be paid by him to one of the next of kin. *Deobold v. Oppermann.* 581

4. Nor is it any defense that, pursuant to an agreement made with them at the time the sureties executed the bond, the administrator deposited with them the proceeds of the estate, to be retained until they were discharged from liability on the bond, and with the authority to use the proceeds in their business, they paying interest; and that upon the rendition of the decree discharging them they paid over the amount so deposited. *Id.*
5. A party cannot claim to have been defrauded who has been induced by artifice to do that which the law would have compelled. *Id.*
6. When an administrator obtains by fraud a decree awarding the funds of the estate to him and canceling his bond, this, in itself, is a breach of the covenant of the bond that he will faithfully execute his trust, and renders the sureties liable; they cannot stand as innocent parties in relation to an act which they have covenanted shall never be performed. *Id.*

— When bank not chargeable with notice of fraudulent conspiracy in which some of its directors were engaged.

See Mayor, etc. v. Tenth Nat. Bk. 446

FRAUD (STATUTES OF).

See STATUTES OF FRAUDS.

FRAUDULENT CONVEYANCES.

1. In an action by creditors of the vendor to set aside a transfer of property, where it appears there was a valuable consideration for the transfer, and there is no proof of conspiracy between the vendor and the vendee to defraud the cred-

itors of the vendor, proof of acts and declarations of the vendor showing a fraudulent intent on his part are inadmissible against the vendee. *Bush v. Roberts.* 278

2. The action is only maintainable on proof of actual notice on the part of the vendee of the fraudulent intent, or knowledge of circumstances equivalent to such notice. Notice or knowledge may not be made out from declarations of the vendor. *Id.*
3. Where an agreement is made between two partners for the purpose of hindering and delaying the creditors of one of them, by which the legal title to the firm property is transferred to the other, it is competent for them, in the absence of any interference by creditors, to rescind it at any time and to restore to each, a legal interest in the property. *Greenwood v. Marvin.* 423

GENERAL TERM.

1. When the General Term reverses a surrogate's decree, imposing costs upon an executor or trustee personally, it must appear in the order of reversal that the ground therefor was the abuse of discretion by the surrogate; in the absence of this statement, the order is not sustainable. *In re Selleck.* 284
2. To authorize the General Term to review the facts on an appeal from a surrogate's decree admitting a will to probate, it is not essential that the surrogate's finding of fact should be challenged by an exception, nor is any request to find further facts necessary. An appeal on the facts, as well as on the law, is sufficient to give the appellate court jurisdiction, and an exception to a finding of fact is neither necessary or proper. *Burger v. Burger.* 523
3. The questions which may be raised by exception under the Code of Civil Procedure (§ 2545), permitting an exception to be taken to the ruling of the surrogate upon

an issue of fact, are questions of law. The findings of a material fact without evidence, a refusal to pass upon a question of fact, or to find a fact which the evidence conclusively establishes, if properly excepted to, raises a question of law, and to such a ruling an exception is permitted under said section; but it has no relation to findings on controverted facts or to refusals to find facts not conclusively established. *Id.*

4. An order of the General Term reversing, on the facts, the decree of the surrogate and directing issues to be tried by a jury, is not reviewable here. *Id.*

5. The General Term has power to amend an order of reversal so as to show that the reversal was upon the facts, although an appeal has been perfected and a return made to this court, and the order, as amended, may be attached to the return. *Ross v. Gleason.* 688

GRANT.

Although a street railroad corporation be created for a limited period, it may acquire title in fee to property necessary for its use; and where the grant to it of the franchise to construct and operate its road in a city street is not, by its terms, limited and revocable, the grant is in fee, vesting the grantee with an interest in the street in perpetuity to the extent necessary for a street railroad; the rights granted to be exercised by the corporation or whomsoever may lawfully succeed to them. *People v. O'Brien.* 1

GUARANTY.

1. Where, in an action upon a guaranty of collection of a debt, the defense is, that the debtor was not prosecuted with due diligence, evidence that a delay in prosecution was with the acquiescence of the guarantor, is competent, on the part of the plaintiff, as bearing upon this issue. *Mead v. Parker.* 259

2. Proof of such acquiescence is also competent, as showing a waiver by the guarantor of his strict right to take advantage of the creditor's indulgence, to avoid the guaranty. *Id.*

3. Upon the sale by De M. & Co. to K., plaintiff's testator, of certain shares of corporate stock, as an inducement thereto, said firm executed to K. a writing guaranteeing that, so long as he held the stock, he should receive dividends thereon equal to seven per cent per annum, and agreeing that they would make good any deficiency. *Held*, that this writing was an original contract, and, although in the sale of the stock they were, in fact, acting as agents for an undisclosed principal, in making it they were principals, not sureties; that the guaranty was not limited to the duration of the partnership or the lives of the copartners; and that, therefore, an action was maintainable upon the guaranty, against the executrix of the surviving member of said firm, for deficits accruing after the death of such survivor. *Kernochan v. Murray.* 306

HABEAS CORPUS.

1. The return of the sheriff to a writ of *habeas corpus* issued to inquire into the cause of imprisonment of one imprisoned for contempt in the non-payment of alimony and counsel fees in a divorce case did not affirmatively show that the relator had not been imprisoned for the period specified, notice of the proceedings was given as required by said Code (§ 2038) to the plaintiff in the action. She appeared and made what was termed a return verified by her affidavit, which stated facts showing that the relator had not been actually confined for the prescribed period; to this he demurred. *Held*, that this was an admission of the facts. *People ex rel. Clark v. Grant.* 584

2. *It seems* that under the sheriff's return the relator would not have been entitled to his discharge. *Id.*

- 3 *It seems*, also, that if objection had been made, a further return by the sheriff, showing the facts, might have been made, or the judge might have taken oral evidence to ascertain them. (§ 2031.) *Id.*

HEIRS AND NEXT OF KIN.

— *An heir-at-law who has purchased real estate of which his ancestor died seized, on sale under a decree in an action to admeasure dower, although sale was made subject to taxes unpaid at the death of decedent, may compel payment thereof by the personal representatives.*

See Smith v. Cornell.

554

HUSBAND AND WIFE.

- 1 The rule of the common law making a husband liable for the tortious acts of his wife, was not abrogated by the Code of Civil Procedure and is still in force. *Mangam v. Peck.* 401
- 2 Accordingly *held*, that a husband was properly joined with his wife, as defendant, in an action to recover damages for a fraud perpetrated by the wife. *Id.*

IMPRISONMENT.

1. The provision of the Code of Civil Procedure (§ 157), declaring that "a prisoner committed to jail upon process for contempt * * * must be actually confined and detained within the jail," etc., and the provision (§ 111, as amended by Laws of 1886, chap. 672, § 5), providing that "no prisoner shall be imprisoned within the prison walls of any jail" under a commitment on and fine for contempt for non-payment of alimony or counsel fees in a divorce case, for a longer period than that specified, refer to an actual imprisonment within the walls of a jail, not the technical restraint under which a person is supposed to be who is committed to the custody of his

counsel and suffered to go at large. *People ex rel. Clark v. Grant.* 584

2. The return of the sheriff to a writ of *habeas corpus* issued to inquire into the cause of imprisonment of one imprisoned for contempt in the non-payment of alimony and counsel fees in a divorce case did not affirmatively show that the relator had not been imprisoned for the period specified. Notice of the proceedings was given as required by said Code (§ 2038) to the plaintiff in the action. She appeared and made what was termed a return verified by her affidavit, which stated facts showing that the relator had not been actually confined for the prescribed period; to this he demurred. *Held*, that this was an admission of the facts. *Id.*

3. *It seems* that under the sheriff's return the relator would not have been entitled to his discharge. *Id.*

INDICTMENT.

1. A variance between the averment in an indictment for murder and the proof as to the day on which the crime was committed, is immaterial and may be disregarded, or the indictment may be amended. (Code Crim. Pro. §§ 293, 294, 295.) It is sufficient that the crime was committed at some time prior to the finding of the indictment and that it can be so understood from its allegations. (Code Crim. Pro. §§ 280, 284.) *People v. Jackson.* 862
2. *It seems* that under the Penal Code (§ 550), in an indictment for receiving stolen goods, it is not necessary to allege in terms that the property was received by the accused feloniously or with criminal intent. *People v. Weldon.* 569
3. *It seems*, also, that conceding a person who receives such property with a laudable intent, is not guilty of the crime, and even if a proviso to that effect had been incorporated in the statute, it would not have been necessary to negative the ex-

ception in the indictment; it would be for the defendant to show that he came within the exception. *Id.*

4. In such an indictment it was alleged that the defendant criminally received the property. *Held*, that this was the equivalent of feloniously, and constituted a sufficient averment of criminal intent. *Id.*

5. Also, *held*, that if the indictment was defective in this respect the case came within the provision of the Code of Criminal Procedure (§ 285), providing that "no indictment is insufficient * * * by reason of an imperfection in matter of form which does not tend to the prejudice of the substantial rights of the defendant on the merits." *Id.*

INJUNCTION.

Where an executor, having a power of sale of the testator's real estate, to pay debts, is taking steps to execute the power for the purpose of paying debts which are outlawed, those who have succeeded to the testator's title may maintain an action to restrain such sale, as it would place a cloud upon their title. *Butler v. Johnson.* 204

INSURANCE (LIFE).

Plaintiff received two policies of insurance upon his life issued by defendant, giving his notes and a check for the premiums, under an agreement with defendant's agent that certain policies then held by plaintiff in other companies, and which were delivered by him to said agent, should be surrendered by the latter to the insurers and their surrender value paid in cash, or paid-up policies obtained therefor, the amount in either case to be satisfactory to plaintiff. In case of the agent's failure to make arrangements for surrender, satisfactory to plaintiff, it was agreed the latter could return the policies and receive back his notes and check.

The policies contained provisions to the effect that no agent of the company had power to make or modify the contract of insurance, or to bind it by any promise. The agent failed to effect a surrender of the old policies satisfactory to plaintiff, and on refusal of defendant to receive back its policies and surrender the notes and check, he brought suit to compel such surrender. *Held*, that said provisions in the policies related to the policies themselves after they became executed instruments between the parties; that the agreement with the agent as to a surrender of the old policies was a condition precedent to the full delivery and acceptance of defendant's policies, and until fully complied with or waived no valid contract of insurance existed, and, therefore, that said provisions did not apply; that it was immaterial whether the agent had power to make a conditional delivery or not, as plaintiff had power to attach such conditions as he chose to the acceptance, and if the agent lacked the power the result would still be that there was no absolute acceptance, and so no contract; and that, therefore, plaintiff was entitled to the relief sought. *Harnickell v. N. Y. L. Ins. Co.* 390

JUDICIAL SALES.

A judgment in a partition suit directed a sale, the description of the premises, after giving the metes and bounds, closed thus: "Containing thirty-one acres, more or less." The notice of sale contained the same description. In a hand-bill issued before the sale in the name of the referee appointed to sell, the boundary lines were omitted and the premises briefly described as the farm of D. "containing thirty-one acres." The sale took place upon the premises and the contract signed by the purchaser contained the words "more or less." He sought to be relieved from his purchase on the ground that when he bid he had one of the hand-bills in his possession and believed that the premises contained thirty-one

acres when, in fact, they contained only twenty-four and three-quarters. *Held*, that the purchaser was chargeable with negligence in failing to obtain full and accurate information, and so relief was properly denied; also, that the matter was one resting in the discretion of the court below and was not reviewable here. *Dennerlein v. Dennerlein*. 518

— *An heir-at-law who has purchased real estate, of which his ancestor died seized, on sale under a decree in an action to admeasure dower, although sale was made subject to taxes unpaid at the death of decedent, may compel payment thereof by the personal representatives.*

See Smith v. Cornell.

554

JURISDICTION.

1. The remedy against a foreign administrator, in his representative character, to charge the assets of his intestate for a debt or liability of the decedent, is governed by the law of the jurisdiction, and must be pursued in the legal tribunals of the state or country where the decedent resided at the time of his death and where administration was granted. *Lyon v. Park*. 350
2. The presumption is that a court of limited and inferior jurisdiction is without jurisdiction when the jurisdictional facts are not alleged in a complaint in an action therein. *Gilbert v. York*. 544
3. Under the provision of the state Constitution, as amended in 1873 (art. 6, § 15), and under the provision of the Code of Civil Procedure (§ 840), defining the jurisdiction of County Courts, they are courts of limited and inferior jurisdiction, and so are affected by such presumption. *Id.*
4. Under the amendment of the section of the Code of Civil Procedure making provision for the trial by jury of controverted questions of fact arising in proceedings in Surrogate's Court (§ 2547) made in 1886 (Chap. 119, Laws of

1886), which authorizes the surrogate of the county of New York, in his discretion, to transfer to the Court of Common Pleas proceedings for the probate of a will, for the purpose of having the issues of fact therein tried by a jury, and provides for the review of the verdict of a jury, this court is not given jurisdiction, on appeal to it from an order of the General Term affirming the verdict, to review the questions of fact for the purpose of determining whether the verdict was against the weight of evidence; its jurisdiction is limited to the review of questions of law. (§ 1337.) *In re Bull*. 624

JURY.

See CHALLENGE (OF JURORS.)

JUSTICES' COURTS.

Plaintiff's complaint in an action in a court of record contained seven causes of action, aggregating \$552.50, besides interest. The answer, besides a general denial, set up two counter-claims, aggregating \$561.26, besides interest. These grew out of transactions in no way connected with plaintiff's causes of action, and had not in any way been applied by the parties in reduction of plaintiff's claim. Upon the trial the parties gave evidence in support of each of their respective claims. The jury brought in special findings for the plaintiff on three of the causes of action amounting to \$657.84, and for defendant on one of his counter-claims \$634.26; balance in favor of plaintiff \$23.59. Under the direction of the trial court they rendered a general verdict for the plaintiff for \$23.59. *Held*, that the causes of action and counter-claim so established were subsisting accounts between the parties within the meaning of the provision of the Code of Civil Procedure (§ 2963, subd. 4), declaring that a justice of the peace shall not take cognizance of a civil action "where in a matter of account, the sum

total of the accounts of both parties, proved to the satisfaction of the justice, exceeds \$400." *Sherry v. Cary.* 514

LEGACIES.

See WILLS.

LEGATEES.

1. Where the probate of a will is contested, legatees under it are not competent witnesses for the proponent as to personal transactions or communications between them and the testator. (Code of Civil Pro. § 829.) *Loder v. Whelpley.* 239
2. Where a legatee, however, has executed a valid release of all his interest the disability is removed, and he may properly be examined as a witness. *Id.*

— As to remedies a legatee may resort to, to obtain payment of legacy. *See* *Butler v. Johnson.* 204

LIBEL.

1. In an action for libel and slander it appeared that plaintiff was on terms of social intimacy with D. and was paying her attention with a view to matrimony. Defendant J., in April, 1879, wrote to D. a letter containing charges against plaintiff, which was the libelous publication complained of. Up to the January before the writing of the letter J. and D. had been very intimate friends; then they became somewhat estranged and their intimacy ceased. During the intimacy, and about four years before the writing of the letter, D. repeatedly requested J. "if she knew anything about any young man she went with, or in fact any young man in the place, to tell her." D. was not then contemplating marriage with any young man, and did not know the plaintiff. The letter referred to the former friendship, to the estrangement, and stated substan-

tially that D. was still very dear to the writer, and for this reason she felt that she must interfere. J., as a witness, testified that when she wrote the letter she thought as much of D. as if she belonged to her family; that she had heard the defamatory rumors and believing them, did not wish her to marry the plaintiff. *Held* (DANFORTH, J., dissenting), that while J. could properly tell what she knew about young men, she was not justified in defaming them even upon request by telling what she did not know and what was not true, although her defamatory statements were based upon rumors and hearsay which she believed to be true; and that, therefore, the letter was not a privileged communication; also, that the evidence failed to show that the letter was written in pursuance of a request made so long before; on the contrary, it appeared from the circumstances and from the letter itself that D. did not at the time desire any information from J., and that this was known to the latter. *Byam v. Collins.* 143

2. *It seems* that if J. had been asked by D. for information as to plaintiff's character and standing, she could properly have given any information she possessed, provided she acted in good faith and without malice. *Id.*
3. As privileged communications are exceptions to the general rule which implies malice in a libelous publication and infers some damage, it rests with the party claiming the privilege to show that the case is brought within the exception. *Id.*
4. The exception covers cases where a communication is made *bona fide* upon any subject-matter in which the party making it has an interest, or in reference to which he has a duty, legal, moral or social, which may fairly be presumed to have led to the communication, when made to a person having a corresponding interest or duty. *Id.*
5. The claim of a moral duty will not be sustained when a person as a volunteer has made defamatory

statements against another in a matter in which he has no legal duty or personal interest, unless he can find a justification in some pressing emergency. *Id.*

LIENS.

See MECHANICS' LIEN.
CHATTEL MORTGAGES.
MORTGAGES.

LIMITATION OF ACTIONS.

1. Although a creditor of an estate was not bound, as the law stood in 1872, to institute proceedings to compel the sale of real estate to pay debts until after an executor or administrator had rendered an account, such omission did not stop the running of the statute of limitations as against the debt. *Butler v. Johnson.* 204
2. An executor or administrator is bound to set up the bar of the statute of limitations, and has no authority to allow a claim so barred. *Id.*
3. As against an estate, therefore, a debt barred by the statute is to be regarded as no debt. *Id.*
4. J. died June 14, 1871, leaving a will which was admitted to probate June 28, 1871. By the will the executrix was authorized to sell the real estate to pay debts. In 1883 defendant, as executrix of J., upon application of a legatee and certain simple contract creditors, published a notice of sale of said real estate to pay said legatee and creditors. The accounts of said executrix had never been judicially settled. In an action brought by grantees of the heirs-at-law to restrain such sale, *held*, that both the legacy and debts were barred by the statute of limitations prior to the time the Code of Civil Procedure went into effect, and so were not revived by the provision of that Code (§ 1819), declaring that, for the purpose of computing the time within which a cause of action

may be commenced by a legatee against an executor to recover a legacy, the cause of action is deemed to accrue when the executor's account is judicially settled; and that the action was maintainable by plaintiffs. *Id.*

5. *It seems* the legatee could have asked the surrogate to decree payment of the legacy by the executrix, which decree could have been enforced if there were assets. (2 R. S. 90, § 45; *id.* 116, § 18.) After the expiration of eighteen months she could have cited the executrix to account before the surrogate and the accounting could have been enforced. (2 R. S. 92, § 52 *et seq.*) She could have proceeded by action for a simple accounting or for payment of the legacies, and could have included therein a prayer that if the personal property was insufficient the executrix should be compelled to exercise the power of sale of the real estate given her by the will, and with the proceeds pay such legacies. The six-years limitation, however, applied to all these remedies, as equity follows the law in cases of concurrent jurisdiction of the two courts, and when the remedy at law is as effectual as the equitable one the legal statute of limitation applies to the remedy in equity. *Id.*
6. Causes of action in which, before the adoption of the Code of Procedure of 1848, the subject was the same at law and in equity, and the remedy only was different, were not included within the ten-years limitation (§ 77), but were provided for by the sections preceding limiting actions at law. *Id.*
7. *It seems* the ten-years limitation applied only to cases over which equity had, before the Code, exclusive jurisdiction. *Id.*
8. The six-years statute of limitations applies to a cause of action for the recovery of a proportionate part of moneys paid upon an illegal assessment for a local improvement in the city of New York, and this is so, conceding the necessity of a provision in the

judgment vacating or reducing the assessment; this is a mere incident to the legal cause of action to recover back the money paid. *Diefenthaler v. Mayor, etc.* 381

9. Although an equitable action may have for its object the accomplishment of the same end as one at law and be based upon the same cause of action, where the remedy sought in equity is a mere incident to the main obligation, and that is a legal one, the legal limitation applies. *Id.*

10. The six-year statute of limitation applies to a cause of action to recover back the amount of an assessment for a local improvement paid to the city of New York, where the assessment was void for want of jurisdiction. *Jew v. Mayor, etc.* 389

11. *It seems* it is wholly unnecessary in such a case to set aside the assessment; the cause of action is one of a legal nature only. *Id.*

12. In pleading the statute it is sufficient to aver that more than six years have elapsed since the cause of action accrued; it is not necessary to aver that, in addition to the six years, the thirty days allowed the city by its charter (§ 105, chap. 335, Laws of 1873), to pay the claim after presentation and during which time the claimant is prohibited from bringing suit, has also elapsed. *Id.*

LITERARY INSTITUTIONS.

See COLLEGES.

MANDAMUS.

1. As to whether the court has power by *mandamus* to compel the performance by arbitrators of their functions, *quare*. *People ex rel. v. Nash.* 810
2. Where an application to the superintendent of buildings, in the city of New York, to approve the plans

and specifications for an addition to a hotel was denied because the height of the proposed structure was over eighty feet, *held*, a *mandamus* was proper to compel such approval. *People ex rel. v. D'Oench.* 859

MARSHALING ASSETS.

1. The right of a creditor of a firm to share in the estate of a deceased member of the firm in the hands of his administrator, where there is no joint estate and the surviving partner is insolvent, is governed by the rules by which courts of equity are guided in distributing the separate estate of an insolvent as between his separate creditors and those of a copartnership of which he was a member. *In re Gray.* 404
2. While, as a general rule in such cases, the separate creditors are entitled to be first paid, where a creditor at the time a debt is contracted for the benefit of the firm, requires therefor and receives the joint and several obligations of the copartners individually, it thereby becomes the several debt of each of them; the holder is entitled to the benefit of the security according to its terms, and has the right to prove it against the separate estate of the decedent, and to share equally with the other separate creditors in the distribution. *Id.*

MASTER AND SERVANT.

1. A master is not bound to furnish the best of known or conceivable appliances; he is simply required to furnish such as are reasonably safe and to see that there is no defect in those which his employes must use. *Stringham v. Hilton.* 188
2. The test is not whether the master omitted to do something he could have done, but whether, in selecting tools and machinery for the servant's use, he was reasonably prudent and careful, and whether those provided were, in fact, adequate and proper for the use to which they were to be applied. *Id.*

3. These rules are not violated when machinery reasonably safe is furnished by the master, but which becomes unsafe when negligently or carelessly used; and if the servant is injured because of such negligent use by a co-servant, the master is not liable. *Id.*
4. When an appliance or machine, not obviously dangerous, has been in daily use for a long time, and has uniformly proved adequate, safe and convenient, its use may be continued without the imputation of negligence or carelessness. *Id.*
5. In an action to recover damages for injuries received by plaintiff while employed in defendant's storehouse, it appeared that plaintiff was engaged in removing grain from the platform of a grain or freight elevator, when the engineer gave it an upward movement which continued until striking against a beam, the rope by which it was suspended broke and the platform fell to the ground floor carrying the plaintiff and inflicting the injuries complained of. The elevator, engine and appliance were proved to be of a kind commonly in use when they were put into the building, and also like those in common use in hotels, breweries, printing houses and public buildings. The motion of the elevator was entirely under the control of the engineer. The whole apparatus was put in under the direction of a manufacturer of many years experience, who testified that he had hundreds of elevators then running similarly constructed for the carriage of freight and employes in charge; that they were put in, leaving a distance between the cross-beam of the elevator and the pulley beam above it, varying from six inches to three feet, a short distance being safer when the elevator was operated with a double rope as was the case here. This elevator had been in use for two years before the accident and was continued in use for several years down to the time of the trial without causing other harm and without complaint, and there was nothing to show that when used with ordinary and reasonable care any harm could result from it. *Held*, the evidence failed to establish a cause of action; and that plaintiff was not entitled to recover. *Id.*
6. Also, *held*, that the injuries having been caused by the act of the engineer, plaintiff's co-servant in starting the elevator, the master was not liable for the improper performance of his duties. *Id.*
7. A master is chargeable with the conduct of his servant only when the latter is acting in the execution of the authority given him and in the performance of his duties. *Morris v. Brown.* 818

MECHANIC'S LIEN.

1. Mechanics' liens having been filed pursuant to the act of 1878 (Chap. 315, Laws of 1879), upon a balance unpaid by the city of New York on a contract with V. for the building of a school-house for the city, and notices of the pendency of actions to foreclose said liens having been served, the city paid over the balance to the contractor upon receiving a bond conditioned that the obligors would save the city harmless from "any judgments, costs, damages, claims, or recoveries in said above-named actions," and would pay any judgment against the city recovered in any such action. In an action upon the bond, it appeared that said actions were consolidated and a judgment was recovered establishing the amounts of the respective liens and directing the city to pay the same out of the contract balance in its possession, "or secured to be paid to it by the bond referred to," but declaring that no personal judgment was given against the city. *Held*, that the debts due the lienors became, by force of the statute a positive incumbrance upon the balance, and made the lienors creditors of the city in lieu of the contractor, and subrogated them to his right of recovery; that the judgment rendered was within the condition of the bond, as the city was bound to pay

it to the extent of its liability to the contractor, and the statute authorized its enforcement by execution; that the provision of the judgment against a personal judgment did not nullify or render incapable of enforcement the judgment actually rendered. *Mayor, etc., v. Crawford.* 639

2. The lienors' judgment was subsequently amended by striking out the clause as to a personal judgment and inserting instead a provision giving such a judgment and authorizing execution against the city. *Held*, that the amendment in no respect enlarged or changed the contract of the sureties or affected their liability, and so was no defense. *Id.*

MISTAKE.

— *When purchaser at partition sale not entitled to be relieved from purchase, because of mistake as to quantity of land.*

See Dennerlein v. Dennerlein. 518

MORTGAGE.

1. The B. S. R. Co., a corporation organized under said act, obtained, by resolution of the common council of the city of New York, authority to lay tracks and run cars over Broadway in said city, upon certain terms and conditions prescribed in the resolution, but with no limitation as to time, or power of revocation reserved. The company duly accepted the grant, and fully complied with and performed all of said terms and conditions. It mortgaged its property and franchises as security for contemplated loans, and authorized its bonds, secured by said mortgage, to be sold, and they were purchased by investors without notice of any defect in their origin or execution; it also made traffic contracts with other roads. Thereafter it was dissolved by statute (Chap. 268, Laws of 1886). *Held*, that while the annulling act was constitutional and valid, its effect

was only to take the life of the corporation; that the corporation took, through its grant from the city, an indefeasible title in the land, necessary to enable it to construct and maintain a street railway in Broadway and to run cars thereon, which constituted property; that all its property, including street rights or franchises, also its mortgages and valid contracts, including the traffic contracts, survived its dissolution; that upon such dissolution its trustees, then in office, became vested with the title to its property under the provisions of the Revised Statutes (1 R. S. 601, §§ 9, 10), as trustees for its creditors and stockholders; that the acts of 1886 (Chap. 271, and chap. 310, Laws of 1886), providing, in case of such a dissolution, for the taking away from the company of its street franchises, and for the winding up of its affairs by suit brought by the attorney-general, and the appointment of a receiver therein, are unconstitutional and void. *People v. O'Brien.* 1

2. As to whether on an application made under the statute (Chap. 275, Laws of 1882, and chap. 26, Laws of 1884, amending part 2, chap. 1, tit. 2, art. 2 of the Revised Statutes) "relating to uses and trusts" by a trustee to mortgage real estate held by him for the purpose of raising funds to be applied in preserving or improving it, not only the interest of the trustee and beneficiaries of the trust, but also the rights and interests of those who may be entitled in remainder on the expiration of the trust, may be covered, *quære. Goebel v. Iffa.* 170

3. The will of R. nominated his wife as executrix and four others as executors. It gave his estate to the executrix and executors in trust, to invest and pay to his wife during life, or until she should marry, so much of the income as might be necessary for the comfortable support of herself and the testator's mother, and the maintenance and education of the testator's children. In case the whole of

- such income should be insufficient for the purposes specified, the will authorized said trustees "to apply to that purpose so much of the principal sum invested as may be necessary to make up the deficiency." The testator left but little personal estate, and resort to the real estate became necessary to carry out the purposes of the trust. *Held*, that the trustees had power, under and pursuant to orders of the court directing it, to borrow money for such purposes, and to mortgage the real estate to secure the same; that the court had power to make the orders and that, therefore, mortgages so executed were valid. *Rogers v. Rogers*. 228
4. Where there has been an unqualified delivery of a mortgage to a third person for the use of the mortgagee, with intent to make it an operative obligation, and the mortgage is recorded by such third person, although such delivery and record was without the knowledge of the mortgagee; if the rights of creditors, purchasers or incumbrancers have not intervened, it is competent for the mortgagee or his representatives to assent to and ratify the arrangement and to enforce the mortgage. *Munoz v. Wilson*. 295
 5. The simple fact, therefore, that an attorney who has taken a mortgage for his client and placed it on record, had previously taken for another client a mortgage on the premises which was not recorded, does not charge the junior mortgagee with knowledge of the existence of the prior mortgage; it must be made to appear clearly that the attorney at the time of the execution and delivery of the second mortgage had in mind the existence of the prior one, and not only this, but also that he knew it was still an existing and valid lien. If he did recollect that the prior mortgage was executed, but honestly believed that it was then or had been satisfied, although mistaken on that point, the second mortgagee would not be charged with notice of its existence. *Constant v. Univ. of Rochester*. 604
 6. The trustees named in a railroad mortgage have no right, as against and without the consent of the holder of bonds secured by the mortgage, and in the absence of provisions therein authorizing it, to waive and condone defaults in the payment of principal or interest on his bonds or to assent to and recognize a new mortgage given priority over his. *Hollister v. Stewart*. 644
 7. The W. C. R. R. Co., for the purpose of obtaining means with which to construct its road, issued bonds secured by a mortgage covering its line, rolling-stock and other property, including a land grant given it by the United States government. By the mortgage it was made the duty of the trustees named therein in case of default in any payment of principal or interest on the bonds to apply the mortgaged property "promptly to that purpose." The company, with the approval of the trustees, was authorized to sell the lands covered by the land grant, accept the mortgage bonds in payment or hold the proceeds of sales as a sinking fund for payment of the bonds. Interest on the bonds was to be paid by the company, and it was provided that none of such proceeds were to be appropriated to the payment of interest unless the treasury of the company should be first exhausted, in which case the proceeds might be used to pay accrued interest, the company to execute to the trustees "income bonds" therefor, to be first paid out of the earnings of the road and secured by a second mortgage. In case of default in the payment of interest on the first mortgage bonds, the whole principal became due at the option of the trustees, and they were authorized to enter upon the granted lands, to take possession of the railroad and rolling-stock and to sell the whole property and apply the net proceeds ratably to the payment of unpaid bonds and interest. By article thirteen of the mortgage the company was required, in case of such default, to execute such further deeds and assurances as were needed and to furnish a full inven-

tory, etc. By a subsequent article the trustees were required, on the requisition of the holders of not less than one-fourth of the bonds, to exercise their power of entry, or sale or both. If a default was made in the omission of anything required by said article "for the further assuring of the title of the trustees, * * * or in any provisions herein contained to be performed or kept by said company" the trustees were given a discretion "to enforce or waive the rights of the bondholders by reason of such default," subject to a power in a majority in amount of the bondholders to instruct the said trustees to waive such default, but it was declared that no action of the said trustees or bondholders, or both, in waiving such default, should extend to or be taken to affect any subsequent default. *Held*, that the trustees had no discretion to waive a default in the payment of principal or interest; that the words "or in any provisions," etc., were to be construed to relate to the provisions other than those already specifically provided for. *Id.*

8. The corporation entered into a contract for constructing its road, by which it agreed that the contractors should receive in payment for the construction the whole issue of first mortgage bonds, all of the stock and the earnings of the road during the period of construction. The contractors were to procure the necessary funds by sale of these securities and were to buy up the interest coupons as they matured. The contractors proceeded with the work, sold bonds and took up maturing coupons, but while the road was incomplete, not having funds to meet interest amounting to over \$150,000 about to mature by an arrangement between the company, the contractors and the trustees, proceeds of the land grant sales to the amount of the coupons so taken up were assigned by the trustees, they taking from the company as security an "income bond" conditioned to pay the amount, with interest, out of the earnings of the road. The company or the contractors then borrowed the

money to take up maturing interest coupons, the company giving as security "land income notes" with the sinking fund securities, which were so assigned, pledged as collateral. To procure money to complete the road the company increased its land income notes to \$300,000. Another default in interest having occurred, the trustees began a foreclosure suit, and under authority of the mortgage, took possession of the road and began to operate it, and thereafter joined with a majority of the bondholders in and adopted a plan for reorganization. This contemplated the substitution of three mortgages for the first mortgage, one of these for \$400,000, which, with the accompanying bonds, was given to secure the land income notes, and interest on certain unfunded coupons; this was made a first lien on all of the property of the company. The trustees assumed to waive all previous or future defaults in payments of principal or interest on the first mortgage bonds; they thereafter applied some part of the proceeds of the land fund to payments of principal and interest on the new preferred mortgage bonds. In an action brought by plaintiff, who held bonds secured by the first mortgage and who had not assented to the reorganization scheme or to the waiver of defaults, against said trustees, a judgment was rendered compelling them to pay the proceeds of the land sales in ratable proportions upon plaintiff's bonds and adjudging the new mortgages to be void as to him. *Held*, no error; that the scheme of reorganization could only be made effective by consent of all the original bondholders or by a foreclosure cutting off their lien; that plaintiff had a right to stand upon his contract and the trustees had no power to compel him to make a new and different one. *Id.*

9. By the fourth article of the mortgage, securing the bonds, it was provided that "during the construction of the said railroad hereby mortgaged, the interest on the bonds * * * shall be paid out of the earnings of the said road and the proceeds of sales of the

first mortgage bonds," and as by their contract the contractors were to receive in payment for construction the whole issue of first mortgage bonds, and the earnings of the road during construction; *held*, that the coupons taken up by them were extinguished as obligations and could not form the basis of a claim by them against the company. (GRAY, J.; DANFORTH and PECKHAM, JJ., concurring.) *Id.*

10. The first mortgage contained a provision that neither of the trustees "shall be answerable except for his own willful default or neglect." The trial court found that defendants, although acting erroneously, proceeded in good faith. Plaintiff claimed that the bonds of those who assented to the reorganization should be considered as extinguished, and that all the proceeds of the land grant and income from earnings should be devoted to the payment of bonds held by the non-assenting owners. *Held*, that the omission to pay plaintiff had some excuse in his exorbitant claims, and that judgment was properly rendered against the trustees, as such, and not personally. *Id.*

11. Also, *held*, that the holders of the new preferred bonds were not necessary parties; that the trustees and the company are all the parties necessary. *Id.*

See FORECLOSURE.

MOTIONS AND ORDERS.

1. When the General Term reverses a surrogate's decree, imposing costs upon an executor or trustee personally, it must appear in the order of reversal that the ground therefor was the abuse of discretion by the surrogate; in the absence of this statement, the order is not sustainable. *In re Selleck.* 284
2. *It seems* the granting or refusal of a motion to postpone the trial of a criminal action is in the discretion of the court, and its decision thereon, where there is no abuse of discre-

tion, is not reviewable upon appeal. *People v. Jackson.* 362

3. Where such an application is based upon the ground of the absence of a witness, it must appear to the court, first, that the witness is really material; second, that the party applying has been guilty of no neglect; third, that the witness can be had at the time to which the trial is deferred. *Id.*
4. An order of the General Term reversing, on the facts, the decree of the surrogate and directing issues to be tried by a jury, is not reviewable here. *Burger v. Burger.* 523
5. An order of the General Term of the Supreme Court affirming an order of Special Term confirming the report of the commissioners of estimate and assessment in proceedings to acquire title to lands for the purpose of establishing a public place in the city of New York under the act of 1884 (Chap. 451, Laws of 1884), is not reviewable here. *In re Board Street Opening, etc.* 561
6. The General Term has power to amend an order of reversal so as to show that the reversal was upon the facts, although an appeal has been perfected and a return made to this court, and the order as amended may be attached to the return. *Ross v. Gleason.* 683

MUNICIPAL CORPORATIONS.

1. *It seems* that, while, by the incorporation of a company under the act of 1884 (Chap. 252, Laws of 1884), providing for the organization of street railroad companies, it is endowed with capacity to acquire and hold such rights and property, real and personal, as are necessary to enable it to transact the business for which it was created, and is allowed to mortgage its franchise as security for loans made to it, it has no present right or authority to construct or operate a railroad upon the streets of any municipality. *People v. O'Brien.* 1

2. This right it may acquire by purchase, but it can only be acquired from the city authorities, who can grant or refuse it at their pleasure, and may grant their consent upon such terms and conditions as they choose to impose. *Id.*
3. As municipal corporations are creatures of the state and exist and act in subordination of its sovereign power, the legislature may determine what moneys they may raise and expend and what taxation for municipal purposes may be imposed; and so, it may compel such a corporation to pay a claim which has some meritorious basis to rest on. *Mayor, etc. v. Tenth Nat. Bk.* 446
4. The property of a municipality, acquired and held for governmental and public uses, and used for public purposes, is not a taxable subject within the purview of the tax laws, unless specially included. *People ex rel. v. Bd. of Assessors.* 505
5. This exemption does not depend upon the origin of the title of the municipality or the location of the property, but applies whether it was acquired by purchase or voluntary grant, or as the product of taxation, or whether the property is situated within or without the territorial limits of the municipality. *Id.*

See NEW YORK (CITY OF).

NEGLIGENCE.

1. In an action to recover damages for injuries received by plaintiff while employed in defendant's storehouse, it appeared that plaintiff was engaged in removing grain from the platform of a grain or freight elevator, when the engineer gave it an upward movement which continued until striking against a beam, the rope by which it was suspended broke and the platform fell to the ground floor, carrying the plaintiff and inflicting the injuries complained of. The eleva-

tor engine and appliance were proved to be of a kind commonly in use when they were put into the building, and also like those in common use in hotels, breweries, printing houses and public buildings. The motion of the elevator was entirely under the control of the engineer. The whole apparatus was put in under the direction of a manufacturer of many years experience, who testified that he had hundreds of elevators then running similarly constructed for the carriage of freight and employees in charge; that they were put in, leaving a distance between the cross-beam of the elevator and the pulley beam above it, varying from six inches to three feet, a short distance being safer when the elevator was operated with a double rope, as was the case here. This elevator had been in use for two years before the accident and was continued in use for several years down to the time of the trial without causing other harm and without complaint, and there was nothing to show that when used with ordinary and reasonable care any harm could result from it. *Held*, the evidence failed to establish a cause of action, and that plaintiff was not entitled to recover. *Stringham v. Hilton.* 188

2. Also, *held*, that the injuries having been caused by the act of the engineer, plaintiff's co-servant in starting the elevator, the master was not liable for the improper performance of his duties. *Id.*
3. R., plaintiff's intestate, was riding on a public highway with her husband, who was driving. In attempting to cross defendant's tracks at a crossing they were both killed by a collision with a passing train. In an action to recover damages, it appeared that at this crossing, in the absence of obstructions, a train upon the freight track, which came first, or upon the passenger track which was seventy feet distant from the freight track, was visible for a distance of one or two miles. In approaching the freight track the husband stopped his horse when a hundred or more yards away

and then again within fifteen yards of the crossing on account of the passage of a freight train. As soon as it had passed he crossed the freight track, and, in an endeavor to cross the passenger track, the collision occurred. There was no proof as to the manner of the accident except that the horse was seen jumping to get across and did, in fact, escape. The plaintiff was nonsuited. *Held*, error; that if the husband was negligent, his negligence could not be imputed to the wife; that while she had no right, because her husband was driving, to omit reasonable and prudent effort to see for herself that the crossing was safe, she was not bound to suspect a purpose on the part of her husband to cross until she saw it being executed; that the presumption was they both saw the approaching train, and she was not blamable in thinking and expecting he would stop again; that when she saw he was about to make the attempt to cross, as they must have been then very close to the track, she was not bound to jump from the wagon, seize the reins or interfere with the driver; that even if she did not entreat him to stop, but sat silent, it does not follow, as matter of law, that she was negligent, as she might not have had time or might have been paralyzed from fright, and the question was one of fact for a jury. *Hoag v. N. Y. C. & H. R. R. Co.* 199

4. The degree of care to be exercised in order to avoid the charge of negligence varies with the circumstances and the emergencies. *Id.*
5. Defendants were engaged, under a contract with the aqueduct commissioners of the city of New York, in excavating for a tunnel. By their contract they were bound to furnish "all facilities for the purpose of inspection." M., defendant's intestate, was a civil engineer in the employ of the commissioners. It was his duty to inspect the work to see that it was done in compliance with the contract. For the purpose of removing the material excavated defend-

ants employed "dump cars" running on a track laid in the shaft. The cars were drawn out by a cable and returned by gravitation, their downward speed being regulated by a brake. They were not intended as facilities for taking persons down the shaft, or fitted for that purpose. M., who was riding on the outside of one of these cars down the shaft, to where the work of excavation was going on, through the neglect of the brakeman in charge of the car to control its velocity, was thrown from the car and killed. In an action to recover damages, it appeared that there was plenty of room in the shaft to go on foot up and down it, and there was no obstruction in the way of the engineer's proceeding to the work on foot; that while M. had been accustomed, with the consent of the brakeman to so ride down, it did not appear that this was with the knowledge of the defendants, or that the brakeman had any authority to give his consent. It also appeared that other engineers employed in the work of inspection usually, although not always, walked up and down the shaft. *Held*, that no duty or obligation rested upon defendants to transport M. into the tunnel or to allow such a use of their car by him, or to manage it with such care as to prevent injury to him when riding thereon; that no license could be implied by such former use of the cars; that the decedent took upon himself the risk, both as to the condition of the cars and the quality and care of the brakeman; and that, therefore, a refusal to nonsuit was error. *Morris v. Brown.* 818

6. *It seems* that if the decedent in going in or coming out of the tunnel, or while engaged in the duty of inspection had been run over by the car, either because of its imperfection or the careless management of the defendants' servant having it in charge, a different question would have been presented. *Id.*

7. A master is chargeable with the

- conduct of his servant only when the latter is acting in the execution of the authority given him and in the performance of his duties. *Id.*
8. To render a railroad corporation liable for injuries to a passenger it is essential to show that the injury was caused by the neglect on its part to perform some duty which, in the exercise of reasonable care, prudence and diligence, it owed to the passenger. *Palmer v. Penn. Co.* 488
9. Plaintiff while a passenger on defendant's road, in the night-time, slipped and fell from the platform of a car and was injured. In an action to recover damages there was evidence sufficient to justify a finding that there was a thin covering of snow upon the platform and some slight spots of ice around its edges, both of which had gathered during the trip. It had stormed during the night and the weather was cold and freezing. The platform was well constructed with proper and convenient steps, and with hand rails on either side. *Held*, the evidence failed to establish defendant's liability and a submission of the case to the jury was error. *Id.*
10. In such a case the rule holding railroad corporations to the use of the utmost possible care in discovering defects in their tracks and running machinery does not apply. That rule regards simply such appliances as would be likely to occasion great danger and loss of life to the travelling public if defects existed therein. *Id.*
11. A railroad corporation is not required to remove immediately and continuously snow and ice on the platforms of cars attached to a train traveling in the night during a continuous storm, or to cover them with sand or ashes in such a manner that no slippery places shall be exposed. It can only be held responsible for dangers produced by the elements when they have assumed a dangerous form and it has had an opportunity to remove their effects. *Id.*
12. It appeared that plaintiff was aware of the condition of the platform, having passed over it two or three times previous to the accident and having twice slipped thereon, and that he was walking upon it at the time without using the hand rails. *Held*, that if defendant was chargeable with negligence there was contributory negligence on the part of the plaintiff. *Id.*
13. Upon hearing of a claim presented by B. to the Board of Claims these facts appeared. Prior to 1840 there was a sewer in J. street in the city of U., constructed by or under the authority of the city, into which the owners of lots adjoining the street drained their respective lots. In that year the state constructed a sewer in said street for the purpose of conducting the water from a weigh-lock on the Erie canal, and took up the old sewer. Those engaged in the construction of the state sewer requested the adjoining lot owners to point out places where they desired openings to be left in the sewer so that their drains could be connected therewith. In compliance with this request the complainant, who owned an adjoining lot, pointed out the places for such openings opposite his lot. The openings were left accordingly and through them the claimant thereafter drained his lot. Since the construction of the state sewer there has been no other sewer in the street or any other means by which the lots could be drained. In 1876 the state sewer became obstructed by deposits therein, causing the water to set back into the basement of a store on the claimant's premises. He gave the superintendent of the canal notice of this occurrence, requesting him to close the gate at the weigh-lock. This request was not complied with, and no action was taken on the part of the state to repair the sewer or remove the obstructions. Thereafter the water from the sewer again came into the basement, doing the damage complained of. The board decided that the claimant was not entitled to any damages. *Held*, error; that the state was bound to use reasonable care in keeping the sewer in repair, and

in its management; and for damages caused by a neglect to perform this duty it was properly chargeable. *Ballou v. The State.* 496

14. A., plaintiff's intestate, a switchman, employed in defendant's yards, in helping to make up and distribute trains, while engaged in his employment caught his foot in a "frog" which connected two converging tracks and was used to effect the transfer of cars from one track to the other; before he could release himself he was run over and killed. In an action to recover damages it was claimed that blocks of wood could be placed in the openings of frogs and thus prevent such accidents. It appeared that A. had been in defendant's employ for some years and for quite a length of time in and about the yard where the accident happened and was acquainted with the frog and knew that it was not "blocked." *Held*, that A. in accepting and continuing in the employment assumed the hazard of all known and obvious dangers, and that he was chargeable with notice of the difficulty in removing the foot when caught in the frog, and of the danger to be apprehended therefrom; and, therefore, that a cause of action was not made out and a refusal to nonsuit was error. *Appel v. B., N. Y. & P. R. R. Co.* 550

—When purchaser at partition sale chargeable with negligence in not obtaining full information as to property, and so not entitled to be relieved from purchase.

See *Dennerlein v. Dennerlein.* 518

NEW YORK (CITY OF).

1. Defendants were engaged, under a contract with the aqueduct commissioners of the city of New York, in excavating for a tunnel. By their contract they were bound to furnish "all facilities for the purpose of inspection." M., defendant's intestate, was a civil engineer in the employ of the commissioners. It was his duty to inspect the work to see that it was done in compliance with the contract. For

the purpose of removing the material excavated defendants employed "dump cars" running on a track laid in the shaft. The cars were drawn out by a cable and returned by gravitation, their downward speed being regulated by a brake. They were not intended as facilities for taking persons down the shaft, or fitted for that purpose. M., who was riding on the outside of one of these cars down the shaft, to where the work of excavation was going on, through the neglect of the brakeman in charge of the car to control its velocity, was thrown from the car and killed. In an action to recover damages, it appeared that there was plenty of room in the shaft to go on foot up and down it, and there was no obstruction in the way of the engineer's proceeding to the work on foot; that while M. had been accustomed, with the consent of the brakeman, to so ride down, it did not appear that this was with the knowledge of the defendants, or that the brakeman had any authority to give his consent. It also appeared that other engineers employed in the work of inspection usually, although not always, walked up and down the shaft. *Held*, that no duty or obligation rested upon defendants to transport M. into the tunnel or to allow such a use of their car by him, or to manage it with such care as to prevent injury to him when riding thereon; that no license could be implied by such former use of the cars; that the decedent took upon himself the risk, both as to the condition of the cars and the quality and care of the brakeman; and that, therefore, a refusal to nonsuit was error. *Morris v. Brown.* 818

2. The provisions of the act of 1880 (Chap. 550, Laws of 1880), providing for vacating and modifying assessments for local improvements in the city of New York, apply only to cases of assessments which are a lien at the time of the commencement of proceedings. *Dieffenhaler v. Mayor, etc.* 831
3. The remedy given by said act to an individual who has paid an

- illegal or irregular assessment applies only where an assessment for the same improvement upon the lands of other parties has been vacated or reduced by the commissioners appointed under the act. *Id.*
4. In an action, therefore, to recover back a proportionate part of moneys paid upon an assessment *prima facie* valid, and which created an apparent lien upon the land assessed, where the facts rendering a portion of the assessment invalid were all *de hors* the record, it is no defense that the assessment has not been vacated or reduced under and in pursuance of said act. *Id.*
5. The six-years statute of limitations applies to such a cause of action, and this is so, conceding the necessity of a provision in the judgment vacating or reducing the assessment; this is a mere incident to the legal cause of action to recover back the money paid. *Id.*
6. *It seems* where an assessment has been paid, a court of equity has no jurisdiction of an action brought simply to have it set aside. *Id.*
7. The six-years statute of limitation applies to a cause of action to recover back the amount of an assessment for a local improvement paid to the city of New York, where the assessment was void for want of jurisdiction. *Jex v. Mayor, etc.* 339
8. *It seems* it is wholly unnecessary in such a case to set aside the assessment, the cause of action is one of a legal nature only. *Id.*
9. In pleading the statute it is sufficient to aver that more than six years have elapsed since the cause of action accrued; it is not necessary to aver that, in addition to the six years, the thirty days allowed the city by its charter (§ 105, chap. 335, Laws of 1873), to pay the claim after presentation and during which time the claimant is prohibited from bringing suit, has also elapsed. *Id.*
10. The act of 1885 (Chap. 454, Laws of 1885), which provides that the "height of all dwelling-houses and of all houses used, or intended to be used as dwellings for more than one family, thereafter to be erected in the city of New York, * * * shall not exceed * * * eighty feet upon all streets and avenues exceeding sixty feet in width," does not apply to hotels, but is mainly applicable to tenement and apartment houses. *People ex rel v. D'Oench.* 359
11. *It seems* that the legislature, in the exercise of the police power under the Constitution, had power to pass such an act. *Id.*
12. Where an application to the superintendent of buildings in said city to approve the plans and specifications for an addition to a hotel was denied because the height of the proposed structure was over eighty feet, *held*, a *mandamus* was proper to compel such approval. *Id.*
13. The "New York Court-House," the construction of which was inaugurated by an appropriation in 1860 (Chap. 500, Laws of 1860), was a county building, and the commissioners appointed in pursuance of the act of 1870 (§ 11, chap. 362, Laws of 1870) to complete the construction were county commissioners. *Mayor, etc., v. Tenth Nat. Bk.* 446
14. The provision of the act of 1873 (Chap. 9, Laws of 1873), authorizing and directing the comptroller of the city of New York to pay back to the various banks, etc., of the city all moneys which had been advanced by them "for the use of any of the departments or commissioners of the city or county" was a valid exercise of legislative power and made such advances binding obligations on the city. *Id.*
15. After commissioners were appointed under said act of 1870 they appointed a treasurer, who applied to defendant to make advances to and for the use of the commissioners. This, after its pres-

dent had consulted with the city comptroller and mayor and had been advised by them that it was proper and right, it agreed to, and did make advances upon checks drawn by said treasurer. No other advances were made to any county commissioners and no other claim for advances to the county was presented under the act. *Held*, that although the commissioners were not authorized to take the advances on the credit of the county, and the defendant was chargeable with notice thereof, they were ratified by the act of 1872 and the city was thereby made liable therefor. *Id.*

16. All of the checks were drawn ostensibly to pay bills and expenses incurred by the commissioners in the construction of the court-house. It appeared that a fraudulent conspiracy had been entered into by and between the treasurer, another of the commissioners, the comptroller and others, by which certain of the bills were to be raised above their true amount and the excess was to be divided between the conspirators. A portion of the advances made by defendant were upon checks in payment of bills so raised. This conspiracy was unknown to the other commissioners, and defendant's president, who was the sole agent and representative of the bank, in making the advances had no knowledge or notice of the conspiracy or the misappropriation. It was customary for the city banks to make advances to the various departments and commissioners in anticipation of appropriations. *Held*, the fact that part of the advances were so misappropriated did not deprive defendant of the right to recover the same. *Id.*

17. It appeared that three of the conspirators were directors of the defendant. Neither of them were present at any meeting of the board of directors when action was taken in reference to the advances, and in no way acted for the bank in the transactions. *Held*, that defendant was not chargeable with notice of the fraud or pre-

cluded from claiming the benefit of good faith on its part; that, under the circumstances, knowledge which the directors who were engaged in the conspiracy had could not be attributed to it.. *Id.*

18. In an action brought to recover an amount claimed by plaintiff to be due him for work done and materials furnished under a contract to regulate and grade a street in the city of New York, the defendant averred in its answer that, upon the estimated quantities of the work to be done, plaintiff was the lowest bidder, but that by reason of "the inadvertence, ignorance, carelessness or error of the surveyor" an error arose whereby the contract, as awarded to plaintiff, required a payment of nearly twice the actual value of the work; that plaintiff, prior to making his bid, knew that the estimate misstated certain items and in bad faith, and with intent to profit by the ignorance of the surveyor, made an unbalanced bid. There was no allegation or proof of a fraudulent collusion between plaintiff and the officers of the corporation. The city surveyor testified on the trial that he made his estimates from surface indications and as correctly as he could, but that the nature of the locality was such that any estimate in advance was unreliable. *Held*, that no fraud was established on the part of plaintiff and he was entitled to recover; that he had a right to the benefit of his own knowledge honestly acquired, so long as he did nothing to mislead or deceive the city; that it having invited bids upon the basis of the estimates made, and awarded the contract to one who was the lowest bidder, tested by the proposals, it could not hold the contractor to a performance and then annul the contract because the actual result so varies from the estimates as to make the accepted bid higher than the others; that the lowest bidder under the estimates is the lowest bidder under the law and he does not lose his right because the estimates are erroneous; that having complied with the law and entered into the contract the city could

- not urge against him its own ignorance or error. *Reilly v. Mayor, etc.* 478
19. The validity of such a contract with the city does not depend upon the accuracy of the officer charged with the duty of making the estimates, but upon an honest effort on his part to be accurate. *Id.*
20. In proceedings to review by *certiorari* the determination of the Board of Assessors of the city of Brooklyn in assessing for taxation certain premises used as a ferry landing-place, it appeared that the city of New York has occupied by its agents and trustees for two hundred and fifty years, under a conceded title, the said landing-place, and used it for the convenience of the public as an incident to a ferry franchise granted to it. *Held*, that the authority conferred and the duty imposed by the grant of the ferry franchise presupposes the right to acquire what was essential to its operation and to maintain the ferry, and as it could not be operated without a landing on the Brooklyn side, the franchise conjoined with the ownership of the landing, constituted a ferry property belonging to New York; devoted to public use, and so that it was not taxable. *People ex rel. v. Bd. of Assessors, etc.* 505
21. Also, *held*, the fact that the city of New York operates the ferry through lessees and derives revenue from the rental, and not by its own operation of the ferry, did not make the franchise or the landing taxable. *Id.*
22. An order of the General Term of the Supreme Court affirming an order of Special Term confirming the report of the commissioners of estimate and assessment in proceedings to acquire title to lands for the purpose of establishing a public place in the city of New York under the act of 1884 (Chap. 451, Laws of 1884), is not reviewable here. *In re Board Street Opening, etc.* 581
23. Such an order is not made appealable, on the ground that its effect is to overrule the objections of the landowners and their request that the proceedings be discontinued, where it does not appear by the record that any order was made upon the objections and request, either independently or embodied in the order made; only the order made and appealed from can be considered. *Id.*
24. The privilege given to the M. T. Co. under the act creating it (Chap. 833, Laws of 1872), "to construct and operate certain railroads in the city of New York," having been defined and limited by the act, it was bound to exercise that privilege, if at all, according to the terms in which it was conferred; it could not take part and reject the rest. *In re Met. Transit Co.* 588
25. As a condition upon which the court could be asked to intervene in its favor to enable it to acquire lands and street rights, the company was obliged to show, under oath, that it is its "intention * * * in good faith, to construct and finish a railroad from and to the places named * * * in its articles of association." (Laws of 1850, chap. 140, § 14.) *Id.*
26. In the petition presented by said company for the appointment of commissioners of appraisal to determine the amount to be paid to the city for the use of the streets included in the routes of said company, it was stated that it was "the intention of said company, in good faith to construct, operate and maintain a railroad on the lines mentioned in said act." The city answered, among other things, denying that it was the intention of the company to construct and operate a road as mentioned in said act of 1872. On the hearing, after the company had offered evidence on the question of intent, the city offered evidence to contradict it and to controvert the expressed intent. This was excluded, the court holding that the application was sufficient proof of the intent. *Held*, error. *Id.*
27. It seems that, if it had not been alleged in the petition and put in issue by the answer, that the com-

- pany in good faith intended to build the road, proof that it did not so intend would have been proper and would have shown "cause against the granting of the prayer of the petition." (Laws of 1850, chap. 140, § 15.) *Id.*
28. It appeared from the petition that the board constituted by said act of 1872 to locate the lines of the three branches authorized thereby made the location, and appraisers were asked for in relation to the streets affected, and also to streets affected by the main line located by the act itself. Subsequently, by order of the court, the petitioners were permitted to have the hearing proceed upon a supplemental petition, by which it appeared that after the passage of the act of 1881 (Chap. 636, Laws of 1881), amending the act of 1872, the board then consisting of different persons from those who composed it when the first location was made, made new locations of the same routes, in many respects, both as to the main route and the branches different from the routes described in the act of 1872 and in the first location. *Held*, that, so far as the "main line" is concerned, neither board had power to name the streets through which it should pass, or change or omit any portion of the lines as located by the act; that the company, if it took any part of the franchise as to it, was bound to take it as given, and as to the changed location of that line the court had no jurisdiction; also, that, as the location of the main line could not be sustained, that of the branches fell with it; that if the act of 1881 was intended to give the company rights in streets other than those named in the act of 1872, it was in contravention of the provision of the state Constitution, as amended in 1874, which prohibits any law authorizing the construction of a street railroad, except upon the consent of landowners and the local authorities or the order of the court (art. 8, § 17); that this prohibition applies to a part of as well as to a complete railroad; but *held*, that no such intention was expressed in or could be implied from the act. *Id.*
29. The provision of the act of 1859 "in relation to taxes and assessments in the city of New York" (Laws of 1859, chap. 802, § 8), requiring the commissioners of taxes and assessments to keep the books containing the "annual record of the assessed valuation of real and personal estate" open for examination and correction "from the second Monday of January until the first day of May in each and every year," does not include the day last mentioned; a tax, therefore, is not invalidated by the fact that the books having been kept open through April thirtieth were closed to the public on the first day of May. *Clarke v. Mayor, etc.* 216
30. Where a tax upon real estate is properly imposed under said act, which is unpaid and a sale is made in conformity to law, any defect in the certificate or lease executed to the purchaser does not impair or affect the sale or authorize him to recover back the purchase-money. This right only exists where the sale is absolutely void for want of jurisdiction. *Id.*
31. Mechanics' liens having been filed pursuant to the act of 1878 (Chap. 315, Laws of 1878), upon a balance unpaid by the city of New York on a contract with V. for the building of a school-house for the city, and notices of the pendency of actions to foreclose said liens having been served, the city paid over the balance to the contractor upon receiving a bond conditioned that the obligors would save the city harmless from "any judgments, costs, damages, claims or recoveries in said above-named actions," and would pay any judgment against the city recovered in any such action. In an action upon the bond, it appeared that said actions were consolidated and a judgment was recovered establishing the amounts of the respective liens and directing the city to pay the same out of the contract balance in its possession, "or secured to be paid to it by the bond referred to," but declaring that no personal judgment was given against the city. *Held*, that the debts due the lienors became, by

force of the statute, a positive incumbrance upon the balance, and made the lienors creditors of the city in lieu of the contractor, and subrogated them to his right of recovery; that the judgment rendered was within the condition of the bond, as the city was bound to pay it to the extent of its liability to the contractor, and the statute authorized its enforcement by execution; that the provision of the judgment against a personal judgment did not nullify or render incapable of enforcement the judgment actually rendered. *Mayor, etc., v. Crawford.* 638

83. The lienors' judgment was subsequently amended by striking out the clause as to a personal judgment and inserting instead a provision giving such a judgment and authorizing execution against the city. *Held*, that the amendment in no respect enlarged or changed the contract of the sureties or affected their liability, and so was no defense. *Id.*

—As to rights acquired by a street railroad corporation under a license to lay its tracks in a street of the city. *See People v. O'Brien.* 1

NOTICE.

—When bank not chargeable with notice of fraudulent conspiracy in which some of its directors were engaged.

See Mayor, etc., v. Tenth Nat. Bank. 446

—When motion to dismiss appeal denied for want of proper notice.

See Fruechel v. Bellesheim. (Mem.) 682

PARTIES.

1. While prior incumbrancers are neither necessary nor proper parties to an ordinary action of foreclosure, when made parties under the general allegation that they claim an interest "as subsequent purchaser, incumbrancer or other-

wise," a decree will not affect them. *Goebel v. Iffa.* 170

2. The rule of the common law making a husband liable for the tortious acts of his wife was not abrogated by the Code of Civil Procedure, and is still in force. A husband, therefore, is properly joined with his wife, as defendant, in an action to recover damages for a fraud perpetrated by the wife. *Mangam v. Peck.* 401

—As to who are necessary parties to action by bondholders claiming a violation of trust duties by the trustees named in a railroad mortgage.

See Hollister v. Stewart. 644

PARTITION.

A judgment in a partition suit directed a sale. The description of the premises, after giving the metes and bounds, closed thus: "Containing thirty-one acres, more or less." The notice of sale contained the same description. In a hand-bill issued before the sale in the name of the referee appointed to sell, the boundary lines were omitted and the premises briefly described as the farm of D. "containing thirty-one acres." The sale took place upon the premises, and the contract signed by the purchaser contained the words "more or less." He sought to be relieved from his purchase on the ground that when he bid he had one of the hand-bills in his possession and believed that the premises contained thirty-one acres, when, in fact, they contained only twenty-four and three-quarters. *Held*, that the purchaser was chargeable with negligence in failing to obtain full and accurate information, and so relief was properly denied; also, that the matter was one resting in the discretion of the court below and was not reviewable here. *Dennerlein v. Dennerlein.* 518

PARTNERSHIP.

1. The right of a creditor of a firm

- to share in the estate of a deceased member of the firm in the hands of his administrator, where there is no joint estate and the surviving partner is insolvent, is governed by the rules by which courts of equity are guided in distributing the separate estate of an insolvent as between his separate creditors and those of a copartnership of which he was a member. *In re Gray*. 404
2. While, as a general rule in such cases, the separate creditors are entitled to be first paid, where a creditor at the time a debt is contracted for the benefit of the firm, requires therefor and receives the joint and several obligation of the copartners individually, it thereby becomes the several debt of each of them; the holder is entitled to the benefit of the security according to its terms, and has the right to prove it against the separate estate of the decedent, and to share equally with the other separate creditors in the distribution. *Id.*
 3. Where, upon the dissolution of a firm, one of the copartners purchases and succeeds to the business, the exclusive right to use trademarks belonging to the firm passes to the purchaser, although no express mention is made of them in the deed of assignment. *Merry v. Hoopes*. 415
 4. Real estate purchased by a firm with its funds for partnership purposes is regarded in equity, so far as the firm and its creditors are concerned, and so long as the partnership affairs remain unsettled, as personal property. *Greenwood v. Marvin*. 423
 5. The interests of the respective members of the firm therein are not required to be established by deed or instrument in writing. *Id.*
 6. The creation of trusts as to such interests is not prohibited by the statute of uses and trusts. *Id.*
 7. *It seems* that after the dissolution of the firm, and after the claims of creditors are discharged and the equities of the respective partners in its assets determined and satisfied, such property, so far as it is preserved in specie and is awarded or conveyed to the respective members, loses its character of personal property and again becomes subject to the rule governing the devolution of real estate. *Id.*
 8. The question as to whether real estate is partnership property may be determined on parol evidence, independent of the particular form which the transaction took or the name in which the title was taken. *Id.*
 9. Where an agreement is made between two partners for the purpose of hindering and delaying the creditors of one of them, by which the legal title to the firm property is transferred to the other, it is competent for them, in the absence of any interference by creditors to rescind it at any time and to restore to each a legal interest in the property. *Id.*
 10. One of two copartners, by an instrument in writing, conveyed to G., plaintiff's testator, "all of the property, both real, personal and mixed, owned by him in partnership." G. executed to his assignor an instrument in writing declaring, in substance, that he held the property and its net proceeds in trust for the assignor. The title to certain real estate which had been purchased and paid for by the partnership and for the purposes of its business, was held in the name of the other partner. *Held*, that the assignee could maintain an action for a dissolution of the partnership, a conversion of its assets into money, payment of firm debts, and an accounting between the copartners and determination of their respective interests in any residue of such property; that the assignment conveyed no present interest in specific articles of property, but simply gave the assignee power to procure its conversion into money and the distribution of any residue after payment of firm debts and adjustment of partnership equities

in whatever form it might exist; that the assignment, therefore, was not void as being a transfer of real estate in trust for the grantor, but the right transferred was a mere chose in action, subject in respect to its mode of transfer to the rules regulating the disposition of personal property. (Code of Civil Pro § 1910.) *Id.*

11. In the complaint it was alleged that the real estate so held in the name of the other partner was purchased by and belonged to the firm. *Held*, that the averments as to the character of the assets were not improper, but were unnecessary; that the question of the ownership of the real estate was merely incidental to the main object of the action, and would have arisen on the accounting if it had not been mentioned in the pleadings. *Id.*

12. Also, *held*, that in any event the transfer was valid as against the assignor, and he having been made a party defendant to the action, was bound by any adjudication, and that the copartner or his personal representatives had no such interest in the question as allowed them to contest the validity of the assignment. *Id.*

13. Also, *held*, that the right of the present plaintiff to continue the action upon the death of G. was adjudicated by the order substituting her as plaintiff, and could not be raised on appeal from the judgment. *Id.*

PENAL CODE.

§ 550. *People v. Weldon.* 569

PERRIN (EDWIN O.).

See PROCEEDINGS ON DEATH OF. 689

PHYSICIANS AND SURGEONS.

—When physician prohibited from testifying on proceedings for the probate of a will, to knowledge acquired

while attending upon the decedent in a professional capacity.

See In re Coleman. 220

Loder v. Whelpley. 239

PLEADING.

1. In pleading the statute of limitations in an action to recover back the amount of an illegal assessment for a local improvement paid to the city of New York, it is sufficient to aver that more than six years have elapsed since the cause of action accrued; it is not necessary to aver that, in addition to the six years, the thirty days allowed the city by its charter (§ 105, chap. 335, Laws of 1873), to pay the claim after presentation and during which time the claimant is prohibited from bringing suit, has also elapsed. *Jew v. Mayor, etc.* 339

2. In an action in a County Court to recover a money judgment, an averment in the complaint that the defendant is a resident of the county is necessary. The provision of the Code of Civil Procedure specifying what must be averred in a complaint (§ 481) is not, exclusive. *Gilbert v. York.* 544

3. The omission of such an averment is, under said Code, a ground for demurrer, as the defect appears upon the face of the complaint. (§ 488.) *Id.*

4. Where the complaint in an action to recover possession of personal property contains no averment of a wrongful taking, but simply alleges a wrongful detention, a general denial puts in issue both plaintiff's title and the wrongful detention, and under it defendant may show title in a stranger although he does not connect himself with the title. *Siedenbach v. Riley* 560

5. The defense of a former suit pending, to be available, must be pleaded. *Hollister v. Stewart.* 644

—A general denial in an action of ejectment puts in issue the alleged unlawful withholding.

See Gilman v. Gilman. 265

POLICE.

1. The authority of the legislature in the exercise of its police powers cannot be limited or controlled by the action of a previous legislature, or by the provisions of contracts between individuals or corporations. *B. E. S. R. R. Co. v. B. S. R. R. Co.* 182
2. *It seems* that the legislature, in the exercise of the police power under the Constitution, had power to pass the act of 1885 (Chap. 454, Laws of 1885), which provides that the "height of all dwelling-houses and of all houses used, or intended to be used as dwellings for more than one family, thereafter to be erected in the city of New York, * * * shall not exceed * * * eighty feet upon all streets and avenues exceeding sixty feet in width." *People ex rel. v. D'Onch.* 359

PRACTICE.

1. Where an application to postpone the trial of a criminal action is based upon the ground of the absence of a witness, it must appear to the court, *first*, that the witness is really material; *second*, that the party applying has been guilty of no neglect; *third*, that the witness can be had at the time to which the trial is deferred. *People v. Jackson.* 362
2. To authorize the General Term to review the facts on an appeal from a surrogate's decree admitting a will to probate, it is not essential that the surrogate's finding of fact should be challenged by an exception, nor is any request to find further facts necessary. An appeal on the facts, as well as on the law, is sufficient to give the appellate court jurisdiction, and an exception to a finding of fact is neither necessary or proper. *Burger v. Burger.* 528
3. The questions which may be raised by exception under the Code of Civil Procedure (§ 2545), permitting an exception to be taken to the ruling of a surrogate upon an

issue of fact, are questions of law. The findings of a material fact without evidence, a refusal to pass upon a question of fact, or to find a fact which the evidence conclusively establishes, if properly excepted to, raises a question of law, and to such a ruling an exception is permitted under said section; but it has no relation to findings on controverted facts or to refusals to find facts not conclusively established. *Id.*

— *Order of General Term reversing decree of surrogate imposing costs on executor must show reversal was on the ground of abuse of discretion on the part of the surrogate, otherwise order not sustainable.* 384
See in re Selleck.

See APPEAL.
HABEAS CORPUS.
MOTION AND ORDER.
PLEADING.
TRIAL.

PRESUMPTIONS.

1. When not privileged the law implies malice in the case of oral as well as written defamation. *Dyam v. Collins.* 148
2. A testator, in requesting a person to sign, as a subscribing witness to his will, is presumed to know the obligations assumed by the witness in respect to the proof of the will; among other things, the duty to testify as to the circumstances attending its execution, including the mental condition of the testator at that time, as evidenced by his action, conduct and conversation. *In re Coleman.* 220
3. The act of a testator, therefore, in requesting his attorney, who drew his will, to become a witness to it, is clearly indicative of an intention to waive the statutory prohibition, and so leave the witness free to perform the duties of the office assigned him. *Id.*
4. It is a presumption of law, in the absence of express words, that the parties to a contract intend to bind

- not only themselves, but their personal representatives. *Kernochan v. Murray*. 306
5. The presumption is that a court of limited and inferior jurisdiction is without jurisdiction when the jurisdictional facts are not alleged in a complaint in an action therein. *Gilbert v. York*. 544
 6. Under the provision of the state Constitution, as amended in 1873 (art. 6, § 15), and under the provision of the Code of Civil Procedure (§ 340), defining the jurisdiction of County Courts, they are courts of limited and inferior jurisdiction, and so are affected by such presumption. *Id.*
 7. The presumption arising from the recent possession of stolen goods, when unexplained, of a criminal connection with the theft, applies as well to a person charged with unlawfully receiving them as to one charged with the original taking. *People v. Weldon*. 569

PRINCIPAL AND AGENT.

1. Upon the sale by De M. & Co. to K., plaintiff's testator, of certain shares of corporate stock, as an inducement thereto, said firm executed to K. writings guaranteeing that, so long as he held the stock, he should receive dividends thereon equal to seven per cent per annum, and agreeing that they would make good any deficiency. *Held*, that this writing was an original contract, and, although in the sale of the stock they were, in fact, acting as agents for an undisclosed principal, in making it they were principals, not sureties; that the guaranty was not limited to the duration of the partnership or the lives of the copartners; and that, therefore, an action was maintainable upon the guaranty, against the executrix of the surviving member of said firm, for deficits accruing after the death of such survivor. *Kernochan v. Murray*. 306
2. Plaintiff received two policies of insurance upon his life issued by defendant, giving his notes and a check for the premiums, under an agreement with defendant's agent, that certain policies then held by plaintiff in other companies, and which were delivered by him to said agent, should be surrendered by the latter to the insurers and their surrender value paid in cash, or paid-up policies obtained therefor, the amount in either case to be satisfactory to plaintiff. In case of the agent's failure to make arrangements for surrender, satisfactory to plaintiff, it was agreed the latter could return the policies and receive back his notes and check. The policies contained provisions to the effect that no agent of the company had power to make or modify the contract of insurance, or to bind it by any promise. The agent failed to effect a surrender of the old policies satisfactory to plaintiff, and on refusal of defendant to receive back its policies and surrender the notes and check, he brought suit to compel such surrender. *Held*, that said provisions in the policies related to the policies themselves after they became executed instruments between the parties; that the agreement with the agent as to a surrender of the old policies was a condition precedent to the full delivery and acceptance of defendant's policies, and until fully complied with or waived no valid contract of insurance existed; and, therefore, that said provisions did not apply; that it was immaterial whether the agent had power to make a conditional delivery or not, as plaintiff had power to attach such conditions as he chose to the acceptance, and if the agent lacked the power, the result would still be that there was no absolute acceptance, and so no contract; and that, therefore, plaintiff was entitled to the relief sought. *Harnickell v. N. Y. L. Ins. Co.* 390
8. The fact that an agent in a contract for the purchase of property binds himself individually, as well as his principal, to pay the purchase-price, does not give him title, or conclusively establish title in him, where the evidence discloses that he, in fact, purchased for his principal. *Siedenbach v. Riley*. 560

4. A principal is only chargeable with notice communicated to or knowledge acquired by his agent in another transaction at another time and when he was acting for another principal, when clear proof is made that the knowledge or notice was present in the mind of the agent at the time of the transaction in question. *Constant v. University of Rochester.* 604

— *When bank not chargeable with notice of fraudulent conspiracy in which some of its directors were engaged.*

See Mayor, etc., v. Tenth Nat. Bk. 446

PRINCIPAL AND SURETY.

See BOND.

PRIVILEGED COMMUNICATIONS.

1. In an action for libel and slander it appeared that plaintiff was on terms of social intimacy with D. and was paying her attention with a view to matrimony. Defendant J., in April, 1879, wrote to D. a letter containing charges against plaintiff, which was the libelous publication complained of. Up to the January before the writing of the letter J. and D. had been very intimate friends; then they became somewhat estranged and their intimacy ceased. During the intimacy, and about four years before the writing of the letter, D. repeatedly requested J. "if she knew anything about any young man she went with, or in fact any young man in the place, to tell her." D. was not then contemplating marriage with any young man, and did not know the plaintiff. The letter referred to the former friendship, to the estrangement, and stated substantially that D. was still very dear to the writer, and for this reason she felt that she must interfere. J., as a witness, testified that when she wrote the letter she thought as much of D. as if she belonged to her family; that she had heard the defamatory

rumors and believing them, did not wish her to marry the plaintiff. *Held* (DANFORTH, J., dissenting), that while J. could properly tell what she knew about young men, she was not justified in defaming them even upon request by telling what she did not know and what was not true, although her defamatory statements were based upon rumors and hearsay which she believed to be true; and, that, therefore, the letter was not a privileged communication; also, that the evidence failed to show that the letter was written in pursuance of a request made so long before; on the contrary, it appeared from the circumstances and from the letter itself that D. did not at the time desire any information from J., and that this was known to the latter. *Byam v. Collins.* 143

2. *It seems* that if J. had been asked by D. for information as to plaintiff's character and standing, she could properly have given any information she possessed, provided she acted in good faith and without malice. *Id.*
3. As privileged communications are exceptions to the general rule which implies malice in a libelous publication and infers some damage, it rests with the party claiming the privilege to show that the case is brought within the exception. *Id.*
4. The exception covers cases where a communication is made *bona fide* upon any subject-matter in which the party making it has an interest, or in reference to which he has a duty, legal, moral or social, which may fairly be presumed to have led to the communication, when made to a person having a corresponding interest or duty. *Id.*
5. The claim of a moral duty will not be sustained when a person as a volunteer has made defamatory statements against another in a matter in which he has no legal duty or personal interest, unless he can find a justification in some pressing emergency. *Id.*
6. As to whether a libelous publication is privileged is a matter of law

- (DANFORTH, J., dissenting), and *it seems* that when, upon the trial of an action for libel, it has been held as matter of law that the publication was privileged, the burden rests upon the plaintiff to establish that it was maliciously made; this is a question of fact to be determined by the jury. *Id.*
7. When not privileged the law implies malice in the case of oral as well as written defamation. *Id.*
8. As to the slanderous words charged J. testified that she uttered them to one C. in confidence, after the most urgent solicitations on his part that she should tell what she knew about plaintiff. The court charged that the words so uttered were privileged. *Held*, error. *Id.*
9. *It seems* that even had it appeared that C. had the interview with J. at the solicitation of plaintiff and as his friend, this would not make the slanderous words uttered in the interview privileged. *Id.*
10. Defamatory words are not privileged simply because uttered in the strictest confidence by one friend to another, nor because uttered upon the most urgent solicitations. *Id.*
11. Where the probate of a will is contested on the ground of the unsoundness of mind of the testator, a physician who has attended upon the deceased in a professional capacity, is not a competent witness for the contestants to testify from knowledge acquired while so attending him as to his mental incapacity. (Code of Civil Pro. § 884.) *In re Coleman*. 290
12. The prohibition of the Code of Civil Procedure (§ 885), against the disclosure by an attorney of a communication by his client to him or his advice thereon, in the course of his professional employment, applies to instructions given, by one proposing to execute a will, to an attorney employed to draw it, and to conversations had with the attorney for the purpose of enabling him to carry out the instructions. *Id.*
13. Where, however, the attorney is requested by the testator to sign the attestation clause of the will as witness thereto, this is an express waiver within the meaning of said Code (§ 886) of the pledge of secrecy so imposed and authorizes the disclosure. *Id.*
14. The provision of the Code of Civil Procedure (§ 834), prohibiting a physician or surgeon from disclosing "any information which he acquired in attending a patient in a professional capacity," etc., applies to proceedings for the probate of a will, and after the death of the patient the prohibition cannot be waived by anyone. *Loder v. Whelpley*. 239
15. The fact, therefore, that a physician is called as a witness by an executor and proponent of a will, does not render him competent to disclose any information acquired while attending upon the testator. *Id.*
16. An attorney, in receiving the directions or instructions of one intending to make a will, although he asks no questions and gives no advice, but simply reduces to writing the directions given to him, still acts in a professional capacity and is prohibited from disclosing any communication so made to him by his client. (Code of Civ. Pro. § 885.) *Id.*

PROFESSIONAL COMMUNICATIONS.

See PRIVILEGED COMMUNICATIONS.

QUESTIONS OF LAW AND FACT.

As to whether a libelous publication is privileged is a matter of law (DANFORTH, J., dissenting), and *it seems* that when, upon the trial of an action for libel, it has been held as matter of law that the publication was privileged, the burden rests upon the plaintiff to establish that it was maliciously made, this

is a question of fact to be determined by the jury. *Byam v. Collins*. 143

— *When negligence a question of fact.*

See Hoag v. N. Y. C. & H. R. R. Co. 199

RAILROAD CORPORATIONS.

1. *It seems* that, while, by the incorporation of a company under the act of 1884 (Chap. 252, Laws of 1884), providing for the organization of street railroad companies, it is endowed with capacity to acquire and hold such rights and property, real and personal, as are necessary to enable it to transact the business for which it was created, and is allowed to mortgage its franchise as security for loans made to it, it has no present right or authority to construct or operate a railroad upon the streets of any municipality. *People v. O'Brien*. 1

2. This right it may acquire by purchase, but it can only be acquired from the city authorities, who can grant or refuse it at their pleasure, and may grant their consent upon such terms and conditions as they choose to impose. *Id.*

3. The B. S. R. Co., a corporation organized under said act, obtained, by resolution of the common council of the city of New York, authority to lay tracks and run cars over Broadway in said city, upon certain terms and conditions prescribed in the resolution, but with no limitation as to time, or power of revocation reserved. The company duly accepted the grant, and fully complied with and performed all of said terms and conditions. It mortgaged its property and franchises as security for contemplated loans, and authorized its bonds, secured by said mortgage, to be sold, and they were purchased by investors without notice of any defect in their origin or execution; it also made traffic contracts with other roads. Thereafter it was dissolved by

statute (Chap. 268, Laws of 1886). *Held*, that while the annulling act was constitutional and valid, its effect was only to take the life of the corporation; that the corporation took, through its grant from the city, an indefeasible title in the land, necessary to enable it to construct and maintain a street railway in Broadway and to run cars thereon, which constituted property; that all its property, including street rights or franchises, also its mortgages and valid contracts, including the traffic contracts, survived its dissolution; that upon such dissolution its trustees, then in office, became vested with the title to its property under the provisions of the Revised Statutes (1 R. S. 601, §§ 9, 10), as trustees for its creditors and stockholders; that the acts of 1886 (Chap. 271, and chap. 310, Laws of 1886), providing, in case of such a dissolution, for the taking away from the company of its street franchises, and for the winding up of its affairs by suit brought by the attorney-general, and the appointment of a receiver therein, are unconstitutional and void. *Id.*

4. Although such a corporation be created for a limited period, it may acquire title in fee to property necessary for its use; and where the grant to it of the franchise to construct and operate its road in a city street is not, by its terms limited and revocable, the grant is in fee, vesting the grantee with an interest in the street in perpetuity to the extent necessary for a street railroad; the rights granted to be exercised by the corporation or whomsoever may lawfully succeed to them. *Id.*

5. The statutes and authorities showing that such franchises are invested with the character of property, and are transferable as such, independent of the life of the original corporation, collated. *Id.*

6. The tracks of a railroad company and the franchise of maintaining and operating its road in a public street are inseparable. *Id.*

7. The provision of the General

Railroad Act (§ 48, chap. 140, Laws of 1850), providing that the legislature may annul or dissolve any corporation formed under the act, "but such dissolution shall not take away or impair any remedy given against any such corporation * * * for any liability which shall have been previously incurred," creates the contract between the state and the corporation, and regulates the rights of parties upon the exercise by the state of the power of repeal. *Id.*

8. The provision in said act of 1884 (§ 15), declaring that the authorization therein contained to companies formed under it, to lease or transfer to other companies their rights to run upon any portion of their tracks, shall not be construed to authorize any company "to lease its rights or franchises" to any other company owning or operating a road parallel thereto, was intended to avoid the monopoly of parallel lines, and to prevent the acquisition by one company of the exclusive possession and control of such lines; it does not, where the lines of two companies are parallel for a portion of their routes, preclude such companies from making traffic contracts for the partial use of their respective routes beyond the line of parallelism. *Id.*

9. The provision of the act of 1839 (Chap. 218, Laws of 1839), authorizing such contracts, is not repealed by said proviso in the act of 1884. *Id.*

10. The parties hereto, two street railroad corporations in the city of B., entered into a contract providing, among other things, for the making by each of connections with the roads of the other "so long as it receives for the transportation of passengers the fare allowed on the 3d of May, 1872, and no longer," and each agreed that it would charge the same rate that it was "permitted to charge by the statutes in force regulating the same" on that day, and would make no change in rates without the consent of the other party. After the making of the contract

it was declared by statute (Chap. 600, Laws of 1875), to be unlawful for any street railroad company in B. to charge more than five cents for each passenger, a sum less than that authorized by the statutes in force May 3, 1872. Defendant thereupon reduced its rates of fare to five cents. In an action to recover a penalty fixed by the contract for a breach of the provision as to rates of fare, *held*, that said provision contemplated a change of rates made by the voluntary action of the parties alone, not one made by paramount authority; also that by the terms of the contract it was to terminate in case a condition of affairs should arise under which the parties would not be permitted to charge the rates of fare specified; and so, that it terminated on the passage of the said act. *B. E. S. R. R. Co. v. B. S. R. R. Co.* 133

11. R., plaintiff's intestate, was riding on a public highway with her husband, who was driving. In attempting to cross defendants' tracks at a crossing they were both killed by a collision with a passing train. In an action to recover damages, it appeared that at this crossing, in the absence of obstructions, a train upon the freight track, which came first, or upon the passenger track which was seventy feet distant from the freight track, was visible for a distance of one or two miles. In approaching the freight track the husband stopped his horse when a hundred or more yards away, and then again within fifteen yards of the crossing on account of the passage of a freight train. As soon as it had passed he crossed the freight track, and, in an endeavor to cross the passenger track, the collision occurred. There was no proof as to the manner of the accident, except that the horse was seen jumping to get across and did, in fact, escape. The plaintiff was nonsuited. *Held*, error; that if the husband was negligent, his negligence could not be imputed to the wife; that while she had no right because her husband was driving, to omit reasonable and prudent effort to see for herself that the crossing was safe,

- she was not bound to suspect a purpose on the part of her husband to cross until she saw it being executed; that the presumption was they both saw the approaching train, and she was not blamable in thinking and expecting he would stop again; that when she saw he was about to make the attempt to cross, as they must have been then very close to the track, she was not bound to jump from the wagon, seize the reins or interfere with the driver; that even if she did not entreat him to stop, but sat silent, it does not follow, as matter of law, that she was negligent, as she might not have had time or might have been paralyzed from fright, and the question was one of fact for a jury. *Hoag v. N. Y. C., etc.* 199
12. The degree of care to be exercised in order to avoid the charge of negligence varies with the circumstances and the emergencies. *Id.*
13. To render a railroad corporation liable for injuries to a passenger it is essential to show that the injury was caused by the neglect on its part to perform some duty which, in the exercise of reasonable care, prudence and diligence, it owed to the passenger. *Palmer v. Penn. Co.* 488
14. Plaintiff while a passenger on defendant's road, in the night-time, slipped and fell from the platform of a car and was injured. In an action to recover damages there was evidence sufficient to justify a finding that there was a thin covering of snow upon the platform and some slight spots of ice around its edges, both of which had gathered during the trip. It had stormed during the night and the weather was cold and freezing. The platform was well constructed with proper and convenient steps, and with hand rails on either side. *Held*, the evidence failed to establish defendant's liability and a submission of the case to the jury was error. *Id.*
15. In such a case the rule holding
- railroad corporations to the use of the utmost possible care in discovering defects in their tracks and running machinery does not apply. That rule regards simply such appliances as would be likely to occasion great danger and loss of life to the traveling public if defects existed therein. *Id.*
16. A railroad corporation is not required to remove immediately and continuously snow and ice on the platforms of cars attached to a train traveling in the night during a continuous storm, or to cover them with sand or ashes in such a manner that no slippery places shall be exposed. It can only be held responsible for dangers produced by the elements when they have assumed a dangerous form and it has had an opportunity to remove their effects. *Id.*
17. It appeared that plaintiff was aware of the condition of the platform, having passed over it two or three times previous to the accident and having twice slipped thereon, and that he was walking upon it at the time without using the hand rails. *Held*, that if defendant was chargeable with negligence there was contributory negligence on the part of the plaintiff. *Id.*
18. A., plaintiff's intestate, a switchman, employed in defendant's yards, in helping to make up and distribute trains, while engaged in his employment caught his foot in a "frog" which connected two converging tracks and was used to effect the transfer of cars from one track to the other; before he could release himself he was run over and killed. In an action to recover damages, it was claimed that blocks of wood could be placed in the openings of frogs and thus prevent such accidents. It appeared that A. had been in defendant's employ for some years and for quite a length of time in and about the yard where the accident happened and was acquainted with the frog and knew that it was not "blocked." *Held*, that A. in accepting and continuing in the employment assumed

- the hazard of all known and obvious dangers, and that he was chargeable with notice of the difficulty in removing the foot when caught in the frog, and of the danger to be apprehended therefrom; and, therefore, that a cause of action was not made out and a refusal to nonsuit was error. *Appel v. B., N. Y. & P. R. R. Co.* 550
19. The privilege given to the M. T. Co. under the act creating it (Chap. 883, Laws of 1872), "to construct and operate certain railroads in the city of New York," having been defined and limited by the act, it was bound to exercise that privilege, if at all, according to the terms in which it was conferred; it could not take part and reject the rest. *In re Mel. Transit Co.* 588
20. As a condition upon which the court could be asked to intervene in its favor to enable it to acquire lands and street rights, the company was obliged to show, under oath, that it is its "intention, * * * in good faith, to construct and finish a railroad from and to the places named * * * in its articles of association." (Laws of 1850, chap. 140, § 14.) *Id.*
21. In the petition presented by said company for the appointment of commissioners of appraisal to determine the amount to be paid to the city for the use of the streets included in the routes of said company, it was stated that it was "the intention of said company in good faith to construct, operate and maintain a railroad on the lines mentioned in said act." The city answered, among other things, denying that it was the intention of the company to construct and operate a road as mentioned in said act of 1872. On the hearing, after the company had offered evidence on the question of intent, the city offered evidence to contradict it and to controvert the expressed intent. This was excluded, the court holding that the application was sufficient proof of the intent. *Held, error.* *Id.*
22. *It seems* that, if it had not been alleged in the petition and put in issue by the answer, that the company in good faith intended to build the road, proof that it did not so intend would have been proper and would have shown "cause against the granting of the prayer of the petition." (Laws of 1850, chap. 140, § 15.) *Id.*
23. It appeared from the petition that the board constituted by said act of 1872 to locate the lines of the three branches authorized thereby made the location, and appraisers were asked for in relation to the streets affected, and also to streets affected by the main line located by the act itself. Subsequently, by order of the court, the petitioners were permitted to have the hearing proceed upon a supplemental petition, by which it appeared that after the passage of the act of 1881 (Chap. 686, Laws of 1881), amending the act of 1872, the board then consisting of different persons from those who composed it when the first location was made, made new locations of the same routes, in many respects, both as to the main-route and the branches different from the routes described in the act of 1872 and in the first location. *Held*, that, so far as the "main line" is concerned, neither board had power to name the streets through which it should pass, or change or omit any portion of the line as located by the act; that the company, if it took any part of the franchise as to it, was bound to take it as given; and as to the changed location of that line the court had no jurisdiction; also, that, as the location of the main line could not be sustained, that of the branches fell with it; that if the act of 1881 was intended to give the company rights in streets other than those named in the act of 1872, it was in contravention of the provision of the state Constitution, as amended in 1874, which prohibits any law authorizing the construction of a street railroad, except upon the consent of landowners and the local authorities or the order of the court (art. 8, § 17); that this prohibition applies to a part of as well as to a complete railroad; but *held*, that no such intention was expressed in or could be implied from the act. *Id.*

24. The trustees named in a railroad mortgage have no right, as against and without the consent of the holder of bonds secured by the mortgage, and in the absence of provisions therein authorizing it, to waive and condone defaults in the payment of principal or interest on his bonds or to assent to and recognize a new mortgage given priorly over his. *Hollister v. Stewart.* 644

25. The W. C. R. R. Co., for the purpose of obtaining means with which to construct its road, issued bonds secured by a mortgage covering its line, rolling-stock and other property, including a land grant given it by the United States government. By the mortgage it was made the duty of the trustees named therein in case of default in any payment of principal or interest on the bonds to apply the mortgaged property "promptly to that purpose." The company, with the approval of the trustees, was authorized to sell the lands covered by the land grant, accept the mortgage bonds in payment or hold the proceeds of sales as a sinking fund for payment of the bonds. Interest on the bonds was to be paid by the company, and it was provided that none of such proceeds were to be appropriated to the payment of interest unless the treasury of the company should be first exhausted, in which case the proceeds might be used to pay accrued interest, the company to execute to the trustees "income bonds" therefor, to be first paid out of the earnings of the road and secured by a second mortgage. In case of default in the payment of interest on the first mortgage bonds, the whole principal became due at the option of the trustees, and they were authorized to enter upon the granted lands, to take possession of the railroad and rolling-stock and to sell the whole property and apply the net proceeds ratably to the payment of unpaid bonds and interest. By article thirteen of the mortgage the company was required, in case of such default, to execute such further deeds and assurances as were needed and to furnish a full inventory, etc. By

a subsequent article the trustees were required, on the requisition of the holders of not less than one-fourth of the bonds, to exercise their power of entry, or sale or both. If a default was made in the omission of anything required by said article "for the further assuring of the title of the trustees, * * * or in any provisions herein contained to be performed or kept by said company" the trustees were given a discretion "to enforce or waive the rights of the bondholders by reason of such default," subject to a power in a majority in amount of the bondholders to instruct the said trustees to waive such default, but it was declared that no action of the said trustees or bondholders, or both, in waiving such default, should extend to or be taken to affect any subsequent default. *Held*, that the trustees had no discretion to waive a default in the payment of principal or interest; that the words "or in any provisions," etc., were to be construed to relate to the provisions other than those already specifically provided for. *Id.*

26. The corporation entered into a contract for constructing its road, by which it agreed that the contractors should receive in payment for the construction the whole issue of first mortgage bonds, all of the stock and the earnings of the road during the period of construction. The contractors were to procure the necessary funds by sale of these securities and were to buy up the interest coupons as they matured. The contractors proceeded with the work, sold bonds and took up maturing coupons, but while the road was incomplete, not having funds to meet interest amounting to over \$150,000 about to mature, by an arrangement between the company, the contractors and the trustees, proceeds of the land grant sales to the amount of the coupons so taken up were assigned by the trustees, they taking from the company as security an "income bond" conditioned to pay the amount, with interest, out of the earnings of the road. The

company or the contractors then borrowed the money to take up maturing interest coupons, the company giving as security "land income notes" with the sinking fund securities, which were so assigned, pledged as collateral. To procure money to complete the road the company increased its land income notes to \$300,000. Another default in interest having occurred, the trustees began a foreclosure suit, and under authority of the mortgage, took possession of the road and began to operate it, and thereafter joined with a majority of the bondholders in and adopted a plan for reorganization. This contemplated the substitution of three mortgages for the first mortgage, one of these for \$400,000, which, with the accompanying bonds, was given to secure the land income notes, and interest on certain unfunded coupons; this was made a first lien on all of the property of the company. The trustees assumed to waive all previous or future defaults in payments of principal or interest on the first mortgage bonds; they thereafter applied some part of the proceeds of the land fund to payments of principal and interest on the new preferred mortgage bonds. In an action brought by plaintiff, who held bonds secured by the first mortgage and who had not assented to the reorganization scheme or to the waiver of defaults, against said trustees, a judgment was rendered compelling them to pay the proceeds of the land sales in ratable proportions upon plaintiff's bonds and adjudging the new mortgages to be void as to him. *Held*, no error; that the scheme of reorganization could only be made effective by consent of all the original bondholders or by a foreclosure cutting off their lien; that plaintiff had a right to stand upon his contract and the trustees had no power to compel him to make a new and different one. *Id.*

27. By the fourth article of the mortgage, securing the bonds, it was provided that "during the construction of the said railroad hereby mortgaged, the interest on the bonds * * * shall be paid

out of the earnings of the said road and the proceeds of sales of the first mortgage bonds," and as by their contract the contractors were to receive in payment for construction the whole issue of first mortgage bonds, and the earnings of the road during construction; *held*, that the coupons taken up by them were extinguished as obligations and could not form the basis of a claim by them against the company. (GRAY, J.; DANFORTH and PECKHAM, JJ., concurring.) *Id.*

28. The first mortgage contained a provision that neither of the trustees "shall be answerable except for his own willful default or neglect." The trial court found that defendants, although acting erroneously, proceeded in good faith. Plaintiff claimed that the bonds of those who assented to the reorganization should be considered as extinguished, and that all the proceeds of the land grant and income from earnings should be devoted to the payment of bonds held by the non-assenting owners. *Held*, that the omission to pay plaintiff had some excuse in his exorbitant claims, and that judgment was properly rendered against the trustees, as such, and not personally. *Id.*

29. Also, *held*, that the holders of the new preferred bonds were not necessary parties; that the trustees and the company are all the parties necessary. *Id.*

REAL PROPERTY.

1. Real estate purchased by a firm with its funds for partnership purposes is regarded in equity, so far as the firm and its creditors are concerned and so long as the partnership affairs remain unsettled, as personal property. *Greenwood v. Marvin.* 428

2. The interests of the respective members of the firm therein are not required to be established by deed or instrument in writing. *Id.*

3. The creation of trusts as to such

interests is not prohibited by the statute of uses and trusts. *Id.*

4. *It seems* that after the dissolution of the firm, and after the claims of creditors are discharged and the equities of the respective partners in its assets determined and satisfied, such property, so far as it is preserved in specie and is awarded or conveyed to the respective members, loses its character of personal property and again becomes subject to the rule governing the devolution of real estate. *Id.*

RECEIVING STOLEN GOODS.

The presumption arising from the recent possession of stolen goods, when unexplained, of a criminal connection with the theft, applies as well to a person charged with unlawfully receiving them as to one charged with the original taking. *People v. Weldon.* 569

REFERENCE.

Where, upon a reference under the statute of a claim against an estate, based on a legal cause of action, the plaintiff recovers nominal damages, even if the plaintiff under the Code of Civil Procedure (§§ 1835, 1836), may not recover his costs (as to which *quære*), the defendant is not legally entitled to costs, nor is the allowance thereof to him discretionary (§ 8240). *Hopkins v. Lott.* 577

REMEDIES.

— *As to remedies a legatee may resort to, to obtain payment of legacy.*
See Butler v. Johnson. 204

— *When mandamus proper.*
See People ex rel. v. D'Oench. 359

REPLEVIN.

See CLAIM AND DELIVERY OF PERSONAL PROPERTY.

REVIVAL OF ACTION.

See ABATEMENT AND REVIVAL.

SALES.

See JUDICIAL SALES.

SLANDER.

1. As to whether a libelous publication is privileged is a matter of law (DANFORTH, J., dissenting), and *it seems* that when, upon the trial of an action for libel, it has been held as matter of law that the publication was privileged, the burden rests upon the plaintiff to establish that it was maliciously made; this is a question of fact to be determined by the jury. *Byam v. Collins.* 148
2. When not privileged the law implies malice in the case of oral as well as written defamation. *Id.*
3. As to the slanderous words charged in an action for libel and slander, J. testified that she uttered them to one C. in confidence, after the most urgent solicitations on his part that she should tell what she knew about plaintiff. The court charged that the words so uttered were privileged. *Held, error. Id.*
4. *It seems* that even had it appeared that C. had the interview with J. at the solicitation of plaintiff and as his friend, this would not make the slanderous words uttered in the interview privileged. *Id.*
5. Defamatory words are not privileged simply because uttered in the strictest confidence by one friend to another, nor because uttered upon the most urgent solicitations. *Id.*

SPECIFIC PERFORMANCE.

1. *It seems* the courts will not compel the specific performance by the purchaser, of a contract for the purchase of real estate, where the validity of the vendor's title depends upon a doubtful question of law, where others having rights,

dependent upon the same question, are not parties to the action. *Abbott v. James.* 673

2. B. died, leaving no parent, child or descendant him surviving, but leaving a widow and certain heirs-at-law. By his will he gave to his wife the use of all his estate during her life or widowhood, the remainder to three charitable societies named. Then followed this clause: "Should any of the property hereby devised to said three societies, upon the death or remarriage of my said wife, consist of real estate, I direct my executor herein named to sell the same and divide the proceeds between the said three societies." Plaintiff, as administrator, with the will annexed, after the death of the widow, contracted to sell the real estate to defendant, who refused to complete the purchase. In an action to compel specific performance, the complaint alleged that B. left no personal estate, but died seized of the real estate in question; defendant demurred. *Held*, that, as under the statute (Chap. 860, Laws of 1860), the testator could not give to the charitable societies more than one-half of his property, the other half was not disposed of by the will; that the question as to whether the failure of the attempted legacies beyond one-half of the estate affected or destroyed the power of sale was of so doubtful a nature it should not be determined in an action wherein the heirs were not parties, and so would not be bound by the decision; that the question was not purely one of law, for while the facts were admitted by the demurrer and so settled in this case, the heirs might show them to be entirely different, and in case it appeared that there was personal property sufficient to pay the shares the societies could lawfully take without resort to the realty this might affect, if it did not control, the decision. *Id.*

by B. to the Board of Claims these facts appeared. Prior to 1840 there was a sewer in J. street in the city of U., constructed by or under the authority of the city, into which the owners of lots adjoining the street drained their respective lots. In that year the state constructed a sewer in said street for the purpose of conducting the water from a weigh-lock on the Erie canal, and took up the old sewer. Those engaged in the construction of the state sewer requested the adjoining lot owners to point out places where they desired openings to be left in the sewer so that their drains could be connected therewith. In compliance with this request the complainant, who owned an adjoining lot, pointed out the places for such openings opposite his lot. The openings were left accordingly and through them the claimant thereafter drained his lot. Since the construction of the state sewer there has been no other sewer in the street or any other means by which the lots could be drained. In 1876 the state sewer became obstructed by deposits therein causing the water to set back into the basement of a store on the claimant's premises. He gave the superintendent of the canal notice of this occurrence, requesting him to close the gate at the weigh-lock. This request was not complied with, and no action was taken on the part of the state to repair the sewer or remove the obstructions. Thereafter the water from the sewer again came into the basement, doing the damage complained of. The board decided that the claimant was not entitled to any damages. *Held*, error; that the state was bound to use reasonable care in keeping the sewer in repair, and in its management; and for damages caused by a neglect to perform this duty it was properly chargeable. *Ballou v. State.* 496

STATUTES.

- Chap. 218, Laws of 1839.
- Chap. 140, Laws of 1850.
- Chap. 252, Laws of 1884.

STATE.

Upon hearing of a claim presented

— Chap. 268, *Laws of 1886*.
 — Chap. 271, *Laws of 1886*.
 — Chap. 310, *Laws of 1886*.
 — 1 R. S. 601, §§ 9, 10.
See *People v. O'Brien*, 1.
 — Chap. 130 U. S. *Laws of 1862*.
 — Chap. 318, *Laws of 1840*.
 — Chap. 261, *Laws of 1841*.
 — Chap. 460, *Laws of 1863*.
 — Chap. 585, *Laws of 1865*, § 5.
 — Chap. 481, *Laws of 1866*.
 — Chap. 317, *Laws of 1880*.
 — 1 R. S. 480, § 86.
See *In re McGraw*, 66.
 — Chap. 000, *Laws of 1875*.
See *B. E. S. R. R. Co. v. B. S. R. R. Co.*, 132.
 — Chap. 275, *Laws of 1882*.
 — Chap. 26, *Laws of 1884*.
 — 1 R. S. 727, § 45 *et seq.*
See *Goebel v. Iffla*, 170.
 — 1 R. S. 727, § 44.
See *Van Brunt v. Van Brunt*, 178.
 — 2 R. S. 90, § 45; *Id.* 92, § 52, *et seq.*; *Id.* 116, § 18.
See *Butler v. Johnson*, 204.
 — 1 R. S. 749, § 4.
See *Meyer v. Cohen*, 270.
 — Chap. 550, *Laws of 1880*.
See *Diefenthaler v. Mayor, etc.*, 331.
 — Chap. 335, *Laws of 1878*, § 103.
See *Jen v. Mayor, etc.*, 339.
 — Chap. 483, *Laws of 1885*.
 — Chap. 713, *Laws of 1887*.
See *In re Cager*, 343.
 — Chap. 454, *Laws of 1885*.
See *People ex rel. v. D'Oench*, 359.
 — Chap. 509, *Laws of 1880*.
 — Chap. 382, *Laws of 1870*, § 11.
 — Chap. 9, *Laws of 1872*.
See *Mayor, etc., v. Tenth National Bank*, 448.
 — Chap. 153, *Laws of 1884*.
 — Chap. 215, *Laws of 1885*.
See *Prentice v. Weston*, 480.
 — 2 R. S. 96, § 75.
See *Greenwood v. Holdbrook*, 485.
 — 2 R. S. 87, § 27.
See *Smith v. Cornell*, 554.
 — Chap. 279, *Laws of 1838*.
 — 2 R. S. 136, § 5.
See *Siedenbach v. Riley*, 560.
 — 2 R. S. 89, § 87.
See *Hopkins v. Lott*, 577.
 — Chap. 451, *Laws of 1884*.
See *In re Bd. St. Opening, etc.*, 581.
 — Chap. 672, *Laws of 1886*, § 5.
See *People ex rel. v. Grant*, 584.
 — Chap. 140, *Laws of 1850*, §§ 14, 15.
 — Chap. 333, *Laws of 1872*.
 — Chap. 636, *Laws of 1881*.

See *In re Met. Tr. Co.*, 588.
 — Chap. 302, *Laws of 1859*, § 8.
See *Clarke v. Mayor, etc.*, 631.
 — Chap. 119, *Laws of 1886*.
See *In re Bull*, 624.
 — Chap. 315, *Laws of 1878*.
See *Mayor, etc., v. Crawford*, 638.
 — Chap. 380, *Laws of 1860*.
See *Abbott v. James*, 613.

See ACTS OF CONGRESS.
 COLLATERAL INHERITANCE ACT
 CONSTITUTIONAL LAW.
 LIMITATION OF ACTIONS.
 STATUTE OF FRAUDS.

STATUTE OF FRAUDS.

1. In an action to recover possession of property alleged to have been wrongfully detained, plaintiff claimed under a bill of sale which the evidence showed was intended as a mortgage. The instrument was not filed as a chattel mortgage. The property was at the time in store, and was subsequently levied on by defendant's intestate by virtue of an attachment. There was sufficient evidence to justify a finding that it never went into plaintiff's possession prior to the levy under the attachment. *Held*, that as against the attaching creditor the mortgage was void under the statute (Chap. 279, *Laws of 1838*); that a mere constructive possession would not answer the requirements of the statute, *Siedenbach v. Riley*. 560
2. Also, *held*, that if the instrument was intended as a pledge, there was a similar infirmity in plaintiff's position, as a pledge could not become operative without delivery to the pledgee. *Id.*
3. Also *held*, that a similar infirmity attaches if the instrument was to be considered as a bill of sale, in the absence of proof that it was made in good faith and without intent to defraud, as the sale not having been accompanied by immediate delivery and followed by a continued change of possession was presumptively fraudulent as against creditors of the vendor. (2 R. S. 136, § 5.) *Id.*

STATUTE OF LIMITATIONS.

See LIMITATION OF ACTIONS.

SURROGATE'S COURT.

1. Where the probate of a will is contested on the ground of the unsoundness of mind of the testator, a physician who has attended upon the deceased in a professional capacity, is not a competent witness for the contestants to testify from knowledge acquired while so attending him as to his mental incapacity. (Code of Civil Pro. § 834.) *In re Coleman.* 220
2. The prohibition of the Code of Civil Procedure (§ 835) against the disclosure by an attorney of a communication by his client to him, or his advice thereon, in the course of his professional employment, applies to instructions given, by one proposing to execute a will, to an attorney to draw it, and to conversations had with the attorney for the purpose of enabling him to carry out the instructions. *Id.*
3. Where, however, the attorney is requested by the testator to sign the attestation clause of the will as witness thereto, this is an express waiver within the meaning of said Code (§ 836) of the pledge of secrecy so imposed, and authorizes the disclosure. *Id.*
4. The provision of the Code authorizing such a waiver by the client does not require it to be in writing or in any particular form or manner, or at any particular time or place; it must be an express waiver made in such a manner as to show the testator intended to exempt his attorney, in the particular case, from the prohibition. *Id.*
5. Where the probate of a will is contested, legatees under it are not competent witnesses for the proponent as to personal transactions or communications between them and the testator. (Code of Civil Pro. § 829.) *Loder v. Whelpley.* 239
6. Where a legatee, however, has executed a valid release of all his interest, the disability is removed, and he may properly be examined as a witness. *Id.*
7. An executor and proponent of a will is not disqualified from testifying to such transactions or communications. *Id.*
8. The provision of the Code of Civil Procedure (§ 834), prohibiting a physician or surgeon from disclosing "any information which he acquired in attending a patient in a professional capacity," etc., applies to proceedings for the probate of a will, and after the death of the patient the prohibition cannot be waived by any other person. *Id.*
9. The fact, therefore, that a physician is called as a witness by an executor and proponent of a will does not render him competent to disclose any information acquired while attending upon the testator. *Id.*
10. An attorney, in receiving the directions or instructions of one intending to make a will, although he asks no questions and gives no advice, but simply reduces to writing the directions given to him, still acts in a professional capacity and is prohibited from disclosing any communication so made to him by his client. (Code of Civil Pro., § 835.) *Id.*
11. Where, however, testimony so prohibited has been improperly received by the surrogate, it is not a sufficient ground for a reversal of his decree "unless it appears to the appellate court that the exceptant was necessarily prejudiced thereby" (Code of Civil Pro., § 2545); i. e., to authorize a reversal it must appear that without the improper evidence the respondent would not have succeeded. *Id.*
12. At the close of the evidence before the surrogate in proceedings for the probate of a will, the contestants moved to strike out certain testimony claimed to be incompetent, the surrogate stated that the motion was substantially disposed

of by the opinion in the case. *Held*, that, as the opinion was thus incorporated into the decision, and as, in the opinion, the surrogate stated his conclusion to be to disregard such evidence, this was substantially granting the motion.

Id.

13. Under the Code of Civil Procedure (§§ 2557-2559, 2570), it is within the discretion of a surrogate, upon the settlement of the accounts of an executor or testamentary trustee to award costs "payable by the party personally or out of the estate or fund as justice requires;" and while the exercise of this discretion is so qualified by the words, "as justice requires" as to authorize the interposition of the General Term, where there has been an abuse of discretion and a violation of justice, it has no other power of review. *In re Selleck*. 284

14. On settlement of the accounts of a testamentary trustee the claim of an administrator, with the will annexed, to commissions was rejected, and the question as to his right to commissions reserved until his accounting as administrator. *Held*, no error. *Matter of Paton*. 480

SUSPENSION OF POWER OF ALIENATION.

1. M. died leaving eight children, seven of whom were married and had children. By her will she gave the whole of her residuary estate to her executors, in trust, to pay over the rents, income and profits to her children equally during their natural lives, and after their decease to their respective wives or husbands during their lives or until they should remarry. The will then provided: "If any of my children should die without issue, or without leaving a husband or wife him or her surviving, then I give, devise and bequeath his or her share to the survivor or survivors of them. * * * If he or she leaves a husband, him or her surviving, then I give, devise and bequeath his or her share to the survivor or

survivors of my said children * * * after the decease or remarriage of said husband or wife." The executors were authorized to sell any of the residuary estate and invest the proceeds. In an action for partition, *held*, that the trust was valid and there was no unlawful suspension of the power of alienation; that the words husband and wife, as used in the will, referred to those living at the death of the testatrix, and so the limitation as to each part of the devisable trust ran for two lives in being at its creation. *Van Brunt v. Van Brunt*. 178

2. *It seems* that the power of sale conferred upon the executors did not effect an undue suspension of the power of alienation. *Id.*

3. The residuary clause also provided that, in case any of the testator's children should die leaving issue, "said issue shall represent their parent *per stirpes* and not *per capita*, and receive their parent's share of the rents and profits after the death of their surviving parent until they became of age, when their interest shall be given to them." *Held*, that upon the death of any child, and of the husband or wife of that child who was living at the death of the testatrix, the portion or share of such child vested at once in his or her children, each one of whom taking his or her proportion in fee, subject only to a postponement of possession during his or her minority, and to the execution of the trust upon the rents and profits during that period; and there was, therefore, no unlawful suspension of the power of alienation; that the fact that the issue of each child were to take *per stirpes* does not make them joint tenants as the statute fixes how they shall take as between themselves (1 R. S. 727, § 44), and makes them tenants in common, in the absence of an express provision for a joint tenancy. *Id.*

TAXATION.

See ASSESSMENT AND TAXATION.

TENANTS IN COMMON AND
JOINT TENANTS.

M. died leaving eight children, seven of whom were married and had children. By her will she gave the whole of her residuary estate to her executors, in trust, to pay over the rents, income and profits to her children equally during their natural lives, and after their decease to their respective wives or husbands during their lives or until they should remarry. The will then provided that, in case any of the testator's children should die leaving issue, "said issue shall represent their parent *per stirpes* and not *per capita*, and receive their parent's share of the rents and profits after the death of their surviving parent until they became of age, when their interest shall be given to them." *Held*, that upon the death of any child, and of the husband or wife of that child who was living at the death of the testatrix, the portion or share of such child vested at once in his or her children, each one of whom taking his or her proportion in fee, subject only to a postponement of possession during his or her minority, and to the execution of the trust upon the rents and profits during that period; and there was, therefore, no unlawful suspension of the power of alienation; that the fact that the issue of each child were to take *per stirpes* does not make them joint tenants as the statutes fixes how they shall take as between themselves (1 R. S. 727, § 44), and makes them tenants in common, in the absence of an express provision for a joint tenancy. *Van Brunt v. Van Brunt*.

178

TRADE-MARKS.

Where, upon the dissolution of a firm, one of the copartners purchases and succeeds to the business, the exclusive right to use trade-marks belonging to the firm passes to the purchaser, although no express mention is made of them in the deed of assignment. *Merry v. Hoopes*.

416

TRIAL.

1. It is only where a bond is shown to have accompanied a mortgage, and it contains the only apparent evidence of the debt to which the mortgage is collateral, that it must be produced, or its non-production accounted for on trial of an action to foreclose the mortgage. *Munos v. Wilson*.

295

2. Where, therefore, it appears on the trial of such an action that, although the mortgage recited the giving of a bond, no bond, was in fact, executed, and the existence of and liability for the debt secured is shown by the statements and covenants contained in the mortgage, the non-production of a bond is not fatal to a judgment of foreclosure. *Id*.

3. M. for the purpose of defrauding his creditors, deeded certain real estate to G. without consideration, upon a verbal agreement that the latter should hold the same for the benefit of M., and dispose of the same as he might direct. Subsequently M. procured G. to execute a mortgage on the premises to C., plaintiff's intestate, for the amount of a debt due by M. to her. The mortgage was delivered by G. to M. with authority to deliver it to C., and M. caused it to be recorded. He did not himself deliver it to C., and the latter died a few weeks after the mortgage was so delivered to M. About the time of receiving the deed, G., without consideration, executed and delivered to M. a deed conveying the premises to his wife M., retained it for about two years after the recording of the mortgage, and then caused it to be recorded. In an action to foreclose the mortgage, *held*, the facts justified a finding of delivery and acceptance of the mortgage; and that the mortgage had a preference over the deed. *Id*.

4. M., as a witness for defendants, testified to certain facts, as to which there was no direct contradictory testimony. This testimony was, however, in conflict with legal presumptions arising

from acts and admissions of M. and G., which were in evidence, and, in several material respects, other testimony of M. was contradicted by that of disinterested witnesses. *Held*, that the trial court was not bound by the testimony of M., even when uncontradicted, but was justified in giving credit thereto only so far as it deemed it in harmony with the other facts and circumstances of the case. *Id.*

TRUSTS AND TRUSTEES.

1. As to whether on an application made under the statute (Chap. 275, Laws of 1882, and chap. 26, Laws of 1884, amending part 2, chap. 1, tit. 2, art. 2 of the Revised Statutes "relating to uses and trusts") by a trustee to mortgage real estate held by him for the purpose of raising funds to be applied in preserving or improving it, not only the interest of the trustee and beneficiaries of the trust, but also the rights and interests of those who may be entitled in remainder on the expiration of the trusts, may be covered, *quære. Goebel v. Iffa.* 170
2. M. died leaving eight children, seven of whom were married and had children. By her will she gave the whole of her residuary estate to her executors, in trust, to pay over the rents, income and profits to her children equally during their natural lives, and after their decease to their respective wives or husbands during their lives or until they should remarry. The will then provided: "If any of my children should die without issue, or without leaving a husband or wife him or her surviving, then I give, devise and bequeath his or her share to the survivor or survivors of them. * * * If he or she leaves a husband, him or her surviving, then I give, devise and bequeath his or her share to the survivor or survivors of my said children * * * after the decease or remarriage of said husband or wife." The executors were authorized to sell any of the residuary estate and invest the proceeds. In an action for partition, *held*, that the trust was valid and there was no unlawful suspension of the power of alienation; that the words husband and wife, as used in the will, referred to those living at the death of the testatrix, and so the limitation as to each part of the devisable trust ran for two lives in being at its creation. *Van Brunt v. Van Brunt.* 178
3. The fact that one of several testamentary trustees is one of the beneficiaries under the trust does not incapacitate him from acting as trustee. He can act freely as to the other beneficiaries and, as to himself, his co-trustees can exercise the control and judgment improper for him. *Rogers v. Rogers.* 228
4. In case the other trustees decline to act, the court may either supply their place or take upon itself the execution of the trust so far as it ought not to be executed by said trustee and beneficiary. *Id.*
5. The will of R. nominated his wife as executrix and four others as executors. It gave his estate to the executrix and executors in trust, to invest and pay to his wife during life, or until she should marry, so much of the income as might be necessary for the comfortable support of herself and the testator's mother, and the maintenance and education of the testator's children. In case the whole of such income should be insufficient for the purposes specified, the will authorized said trustees "to apply to that purpose so much of the principal sum invested as may be necessary to make up the deficiency." The testator left but little personal estate, and resort to the real estate became necessary to carry out the purposes of the trust. *Held*, that the trustees had power, under and pursuant to orders of the court directing it, to borrow money for such purposes, and to mortgage the real estate to secure the same; that the court had power to make the orders and that, therefore, mortgages so executed were valid. *Id.*
6. The creation of trusts as to inter-

ests in real estate purchased by and for a firm, the title to which is taken in the name of one of the copartners, is not prohibited by the statute of uses and trusts. *Greenwood v. Marvin.* 428

7. The employment of the trust fund by an administrator or other trustee for his individual benefit, or as loans to persons engaged in and to be used in business, is illegal and constitutes a *devastavit*, and the funds may be reclaimed by the trustee or the beneficiaries of the trust from anyone receiving them with knowledge of their character. *Deobold v. Oppermann.* 531

8. A transferee from an executor or administrator cannot protect himself from an action brought by the trustee to reclaim the trust fund by showing that such trustee is a legatee under the will or next of kin to the intestate, and thus entitled to an interest in the fund. *Id.*

9. The trustees named in a railroad mortgage have no right, as against and without the consent of the holder of bonds secured by the mortgage, and in the absence of provisions therein authorizing it, to waive and condone defaults in the payment of principal or interest on his bonds or to assent to and recognize a new mortgage given priority over his. *Hollister v. Stewart.* 644

10. The W. C. R. R. Co., for the purpose of obtaining means with which to construct its road, issued bonds secured by a mortgage covering its line, rolling-stock and other property, including a land grant given it by the United States government. By the mortgage it was made the duty of the trustees named therein in case of default in any payment of principal or interest on the bonds to apply the mortgaged property "promptly to that purpose." The company, with the approval of the trustees, was authorized to sell the lands covered by the land grant, accept the mortgage bonds in payment or hold the proceeds of sales as a sinking fund for payment of the bonds. Interest on the bonds

was to be paid by the company, and it was provided that none of such proceeds were to be appropriated to the payment of interest unless the treasury of the company should be first exhausted, in which case the proceeds might be used to pay accrued interest, the company to execute to the trustees "income bonds" therefor, to be first paid out of the earnings of the road and secured by a second mortgage. In case of default in the payment of interest on the first mortgage bonds, the whole principal became due at the option of the trustees, and they were authorized to enter upon the granted lands, to take possession of the railroad and rolling-stock and to sell the whole property and apply the net proceeds ratably to the payment of unpaid bonds and interest. By article thirteen of the mortgage the company was required, in case of such default, to execute such further deeds and assurances as were needed and to furnish a full inventory, etc. By a subsequent article the trustees were required, on the requisition of the holders of not less than one-fourth of the bonds, to exercise their power of entry, or sale or both. If a default was made in the omission of anything required by said article "for the further assuring of the title of the trustees, * * * or in any provisions herein contained to be performed or kept by said company" the trustees were given a discretion "to enforce or waive the rights of the bondholders by reason of such default," subject to a power in a majority in amount of the bondholders to instruct the said trustees to waive such default, but it was declared that no action of the said trustees or bondholders, or both, in waiving such default, should extend to or be taken to affect any subsequent default. *Held*, that the trustees had no discretion to waive a default in the payment of principal or interest; that the words "or in any provisions," etc., were to be construed to relate to the provisions other than those already specifically provided for. *Id.*

11. The corporation entered into a contract for constructing its road,

by which it agreed that the contractors should receive in payment for the construction the whole issue of first mortgage bonds, all of the stock and the earnings of the road during the period of construction. The contractors were to procure the necessary funds by sale of these securities and were to buy up the interest coupons as they matured. The contractors proceeded with the work, sold bonds and took up maturing coupons, but while the road was incomplete, not having funds to meet interest amounting to over \$150,000 about to mature, by an arrangement between the company, the contractors and the trustees, proceeds of the land grant sales to the amount of the coupons so taken up were assigned by the trustees, they taking from the company as security an "income bond" conditioned to pay the amount, with interest, out of the earnings of the road. The company or the contractors then borrowed the money to take up maturing interest coupons, the company giving as security "land income notes" with the sinking fund securities, which were so assigned, pledged as collateral. To procure money to complete the road the company increased its land income notes to \$300,000. Another default in interest having occurred, the trustees began a foreclosure suit, and under authority of the mortgage, took possession of the road and began to operate it, and thereafter joined with a majority of the bondholders in and adopted a plan for reorganization. This contemplated the substitution of three mortgages for the first mortgage, one of these for \$400,000, which, with the accompanying bonds, was given to secure the land income notes, and interest on certain unfunded coupons; this was made a first lien on all of the property of the company. The trustees assumed to waive all previous or future defaults in payments of principal or interest on the first mortgage bonds; they thereafter applied some part of the proceeds of the land fund to payments of principal and interest on the new preferred mortgage bonds. In an

action brought by plaintiff, who held bonds secured by the first mortgage and who had not assented to the reorganization scheme or to the waiver of defaults, against said trustees, a judgment was rendered compelling them to pay the proceeds of the land sales in ratable proportions upon plaintiff's bonds and adjudging the new mortgages to be void as to him. *Held*, no error; that the scheme of reorganization could only be made effective by consent of all the original bondholders or by a foreclosure cutting off their lien; that plaintiff had a right to stand upon his contract and the trustees had no power to compel him to make a new and different one. *Id.*

UNIVERSITIES.

See COLLEGES.

USURY.

1. While the innocent purchaser of a usurious security, when the purchase was induced by fraud, may enforce the security against the maker if he is privy to the fraud, to the extent of the money paid by such purchaser, or may rescind and recover back that sum, with interest, the policy of the usury laws requires a limitation to that amount, and he cannot in any form of action recover more. *Miller v. Zeimer*. 441
2. Where, therefore, a bond and mortgage was executed without consideration, and M., plaintiffs' testator, purchased the same for less than its face, but in good faith and in reliance upon representations on the part of the mortgagor and mortgagee that the securities were valid, given upon a full consideration and free from usury, and where, in an action to foreclose the mortgage the judgment decreed a sale but only to satisfy the sum actually advanced, *held*, that an action was not maintainable against the mortgagor and mortgagee to recover, because of

the fraud, the difference between the value of the mortgage as represented and its actual value to the assignee. *Id.*

VARIANCE.

A variance between the averment in an indictment for murder and the proof as to the day on which the crime was committed, is immaterial and may be disregarded, or the indictment may be amended. (Code Crim. Pro., §§ 293, 294, 295.) It is sufficient that the crime was committed at some time prior to the finding of the indictment and that it can be so understood from its allegations. (Code Crim. Pro., §§ 280, 284.) *People v. Jackson*, 363

VENDOR AND PURCHASER.

It seems the courts will not compel the specific performance by the purchaser, of a contract for the purchase of real estate, where the validity of the vendor's title depends upon a doubtful question of law, where others having rights, dependent upon the same question, are not parties to the action. *Abbott v. James*, 673

— *When purchaser at partition sale not entitled to be relieved from purchase because of mistake as to quantity of land.*

See Dennerlein v. Dennerlein. 518

WAIVER.

1. Where an attorney who has drawn a will is requested by the testator to sign the attestation clause of the will as witness thereto, this is an express waiver, within the meaning of the Code of Civil Procedure (§ 836), of the pledge of secrecy imposed by the prohibition of the Code (§ 835), against the disclosure by an attorney of a communication by his client to him or his advice thereon, in the course of his professional employment, and authorizes the disclosure of communica-

tions made to the attorney by the testator. *In re Coleman*. 290

2. The provision of the Code authorizing such a waiver by the client does not require it to be in writing or in any particular form or manner, or at any particular time or place; it must be an express waiver made in such a manner as to show the testator intended to exempt his attorney, in the particular case, from the prohibition. *Id.*

3. Upon a criminal trial S., a witness for the prosecution, testified to a conversation with one of the defendant's witnesses who had been previously examined and had testified that he had no conversation with S. on the subject. This was objected to on the ground that defendant's witness had not been previously particularly interrogated as to the time, place, etc., and it was received under objection. Defendant thereafter recalled his witness and interrogated him particularly as to the alleged conversation, and he contradicted the version of it testified to by S. *Held*, that while the objection was well taken and would have been fatal to the conviction if defendant had rested upon his exception, he waived the objection by recalling and examining his witness. *People v. Weldon*. 569

WILLS.

1. The provision of the Revised Statutes limiting the amount of property which incorporated colleges may take and hold by gift, grant or devise (1 R. S. 460, § 36), is not confined to colleges incorporated by the regents of the university under the general laws of the state, but applies also to such an incorporation created by special charter, unless inconsistent provisions are to be found in the charter. *In re McGraw*. 66

2. The provisions of the act of 1840 (Chap. 818, Laws of 1840) as amended in 1841 (Chap. 261, Laws of 1841), authorizing the creation of trusts to incorporate colleges, by grants, devises or bequests, do

- not repeal or affect the general law limiting the amount of property which may be taken and held by such a corporation. *Id.*
3. Where, in a special charter granted to an institution of learning, a limitation is put upon its power to hold property, in the absence of some plain and controlling circumstance showing a contrary legislative intent, it must be construed as limiting the taking, as well as holding beyond the amount specified; and a devise or bequest to it, exceeding the amount or value it is permitted to take, is void for the excess. *Id.*
 4. M. died, leaving eight children, seven of whom were married and had children. By her will she gave the whole of her residuary estate to her executors, in trust, to pay over the rents, income and profits to her children equally during their natural lives, and after their decease to their respective wives or husbands during their lives, or until they should remarry. The will then provided: "If any of my children should die without issue, or without leaving a husband or wife him or her surviving, then I give, devise and bequeath his or her share to the survivor or survivors of them. * * * If he or she leaves a husband, him or her surviving, then I give, devise and bequeath his or her share to the survivor or survivors of my said children * * * after the decease or remarriage of said husband or wife." The executors were authorized to sell any of the residuary estate and invest the proceeds. In an action for partition, *held*, that the trust was valid and there was no unlawful suspension of the power of alienation; that the words husband and wife, as used in the will, referred to those living at the death of the testatrix, and so the limitation as to each part of the devisable trust ran for two lives in being at its creation. *Van Brunt v. Van Brunt.* 178
 5. *It seems* that the power of sale conferred upon the executors did not effect an undue suspension of the power of alienation. *Id.*
 6. The residuary clause also provided that, in case any of the testator's children should die leaving issue, "said issue shall represent their parent *per stirpes* and not *per capita*, and receive their parent's share" of the rents and profits after the death or remarriage of their surviving parent until they became of age, when their interest shall be given to them." *Held*, that upon the death of any child, and of the husband or wife of that child who was living at the death of the testatrix, the portion or share of such child vested at once in his or her children, each one of whom taking his or her proportion in fee, subject only to a postponement of possession during his or her minority, and to the execution of the trust upon the rents and profits during that period; and there was, therefore, no unlawful suspension of the power of alienation; that the fact that the issue of each child were to take *per stirpes* does not make them joint tenants as the statute fixes how they shall take as between themselves (1 R. S. 727, § 44), and makes them tenants in common, in the absence of an express provision for a joint tenancy. *Id.*
 7. Where the probate of a will is contested on the ground of the unsoundness of mind of the testator, a physician who has attended upon the deceased in a professional capacity, is not a competent witness for the contestants to testify from knowledge acquired while so attending him as to his mental incapacity. (Code of Civil Pro. § 884.) *In re Coleman.* 220
 8. The prohibition of the Code of Civil Procedure (§ 885), against the disclosure by an attorney of a communication by his client to him or his advice thereon, in the course of his professional employment, applies to instructions given, by one proposing to execute a will, to an attorney employed to draw it, and to conversations had with the attorney for the purpose of enabling him to carry out the instructions. *Id.*
 9. Where, however, the attorney is requested by the testator to sign

only entitled to interest on the residue. *Held*, untenable; that the intention of the testator was to give his wife, during widowhood, the use of all his property, after deducting the \$1,000 legacy. *Id.*

23. The will of R. gave his residuary estate to five beneficiaries, his four children and a college, in unequal proportions, two children to whom advances had been made prior to the making of any will by the testator receiving less than the others. The will provided that "any moneys or indebtedness" that should appear upon the testator's inventories or books of accounts charged as "due him from any of said beneficiaries during his lifetime as an outstanding or unsettled account" at the time of his decease should be considered as forming part of his estate, and a discharge thereof by his executors should be considered as so much payment and should be deducted from the share of such beneficiary, but without interest, unless some obligation "securing such indebtedness" should be found among the testator's assets upon which interest had been paid or charged, in which case it was declared "the said indebtedness shall continue to be charged." It was also declared that any moneys which should appear in his books charged to either of said beneficiaries "to a furniture or allowance account" should not be debited to such beneficiary on settlement of the testator's estate, but should be "considered as a gift." *Held*, that the provision directing a deduction for indebtedness contemplated an actual indebtedness which might have been enforced by the testator in his lifetime, and so did not include the advances above mentioned, which were entered in his books and charged to said children as advances, and in his inventories up to the time of the execution of a will as "unavailable assets," although included as part of the estate "for distribution;" it appearing that in subsequent inventories they were not so included. *In re Robert*. 372

24. The will of P. gave to his daughter S. one-fifth of all his real and

personal estate. By a codicil he directed that S. should have power by her will, "heretofore or hereafter" executed, to dispose of the share devised and bequeathed to her, and to that end he directed that such share should be paid over by his executors to the executors or trustees named in her will in case of her death during his lifetime, but in case she survived, then that such share should be paid over to her. S. died before the testator leaving a will. *Held*, that while the testator gave a power of appointment, which as a power the donee could not execute during the donor's lifetime, yet the further language of the codicil showed the testator's intent to be, in case of the happening of the contingency specified, to devise and bequeath by force of his own will the daughter's one-fifth to such person or persons and in such shares and proportions as she had directed or should direct in the disposition of her own property; that the will of the daughter could be referred to to define and make certain the persons to whom and the proportions in which the one-fifth should pass; and that the executors of the will of P. were properly required to pay over that share to the executors of the will of S. for the purposes of distribution. *In re Pifard*. 410

25. One G. died leaving a widow, two daughters and two sons. By his will he gave to his widow "the net income of his estate," real and personal, for life or until she again married. Upon her remarriage the rents, profits, income and interest were during the remainder of her life to be divided between the widow, the daughters and sons, each class to take one-third, and in case of the death of either of the sons or daughters his or her issue were to take the parent's share, and if there was no issue the surviving son or daughter was to take that share. Upon the widow's death the property was to be divided among the children, each to hold the share given during life, and after the death of either the share of the one so dying went to his or

her lawful children and to the lawful issue of every child who may have died. In case of the death of either son or daughter without issue the share went to the other son or daughter. The daughters opposed probate of the will, but withdrew their opposition upon an agreement, declared by its terms to be binding on the parties to it "and their respective heirs, executors and administrators," made between the widow, the children of the testator and the husbands of the two daughters, by which she covenanted during widowhood to pay over to each of the children, and in case of the death of either, to his or her "legal representatives" one-eighth of the net income of all the testator's real and personal estate. One of the daughters died leaving a husband and no issue her surviving, also leaving a will, by which she appointed her husband executor and gave him all her property, including her interest in her father's estate. The husband died and his executors claimed the share of the income to which, if living, the wife of their testator would have been entitled under the will of her father. In an action to have the rights of the parties under said agreement determined, *held*, that the term "legal representatives" used in said agreement had the same meaning as the similar terms used in the statute of distribution (2 R. S. 96, § 75), i. e., children or their lineal descendants and not executors or administrators; that the general provisions of the will of G. and the scheme of the statute, so far as they relate to or point out the beneficiary or distributee, are the same; that the agreement is to be read as if the provisions of the will, as modified by it, were incorporated in it, and its only effect is to give to the testator's children a larger share of the testator's estate than they would have received under his will, but to be distributed in the same way, and so there being no legal representatives the next of kin of the deceased daughter were entitled to her share. *Greenwood v. Holbrook.* 465

26. K. died in 1868, leaving a will

executed in 1858. His widow, who died later in the same year, and two sons survived him; a daughter mentioned in the will died before the testator. One of the sons was married at the time the will was made; he died before his mother, leaving two sons. By the ninth clause of his will the testator directed that after his wife's death, and his youngest child had arrived at the age of twenty-one years, his executor should sell all that then remained of his estate and divide the net proceeds "equally among the children I may then have or those who may be legally entitled thereto." The fourth clause provided that if the testator's widow marries, the estate is to "descend to the children we now have or may hereafter have, according to the laws of the state of New York." The eleventh clause provided that if either one of his "said children, or any person or persons who may succeed to the interest of them or either," shall contest the will, "such child or children, person or persons shall forfeit her, his or their share, and such share or shares shall be added to the shares of such child, children or persons as shall not interfere with the same, and to be equally divided among the persons last-named, share and share alike." *Held*, that the ninth clause, read together with the other clauses referred to, indicated the understanding of the testator to be that his sons and daughters might not be living at the time of distribution, and that the issue of a deceased son or daughter should share in the proceeds; that, therefore, the children of the testator's deceased son are comprehended in his scheme for the division; also, that, as they derived their right under the testator's will, and not through their deceased father, their mother would not be entitled to a share of the proceeds of the estate.

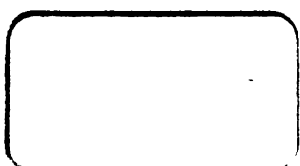
Matter of Puton.

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27. The word "children" is a flexible one, and in determining as to whether, when used in a will, it was intended to be limited strictly to its primary meaning, or was intended to be used in its broader sense as issue, the context may be

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